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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a federal court may hold facially void, for want of public use or purpose, a state statute authorizing exercise of eminent domain powers to permit the state's residents to purchase the land on which they live, so as to alleviate what the legislature has found to be acute and widespread social and economic hardships arising from a unique and enduring concentration of land ownership in the hands of a few.

2. Whether a federal court may proceed to invalidate a state eminent domain statute on federal constitutional grounds despite pending state condemnation proceedings in which the federal plaintiff has invoked those federal grounds and has also argued that state law independently requires both the taking agency and state courts to reject the state legislature's findings of public use and purpose.*

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* The state defendants below were the Hawaii Housing Authority ("HHA"), the Commissioners of the HHA (Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y.K. Sunn). At the time this Jurisdictional Statement is being filed, Commissioners Tom, Tamura, and Chang have been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom has succeeded Mr. Sunn as Executive Director. The HHA, its Commissioners, and its Executive Director are appellants before this Court.

Intervenors-defendants given leave to intervene by the district court below, and appellants before this Court, are the following lessee associations: Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach)†; Kokohead Community Lease-Fee, Inc.†; West Marina Community Association†; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.†; Kamiloiki Community Association; Lunalilo Marine Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community

Association; Kahala Community Association, Inc.†; Kahala Community Fee Purchase Fund*; and Halawa Valley Estates Fee Conversion Corporation. (Those marked with a "†" are appealing separately and filing separate jurisdictional statements.)

Plaintiffs below, appellees before this Court, were the Trustees of the Bishop Estate ("Bishop Estate" or "Estate"): Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. Mr. Ching has since been succeeded by William A. Richardson.

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, dated March 28, 1983, from which this appeal is taken, is reported at 702 F.2d 788 (9th Cir. 1983) (per Alarcon and Poole, JJ.; Ferguson, J., dissenting), and is reprinted as Appendix A.* The Ninth Circuit decision reversed a judgment of the United States District Court for the District of Hawaii (per King, J.). The district court's decision granting partial summary judgment to appellants, dated December 19, 1979, is reported at 483 F. Supp. 62 (D. Haw. 1979), and is reprinted as Appendix B. The district court's decision on appellees' motion for preliminary injunction, dated May 8, 1979, is reported at 471 F. Supp. 871 (D. Haw. 1979), and is reprinted as Appendix C.

* The appendices to this Jurisdictional Statement are bound in a separate volume.

JURISDICTION

The Bishop Estate brought this action for declaratory and injunctive relief in the United States District Court for the District of Hawaii under 28 U.S.C. §§ 1331, 1343, & 2201, and 42 U.S.C. § 1983. The district court granted partial summary judgment to the state defendants and the intervenors-defendants, rejecting the Estate's claim that the Hawaii Land Reform Act violated the Fifth and Fourteenth Amendments to the United States Constitution. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, declaring the Hawaii Land Reform Act invalid on its face. *See* Appendices A and D. Rehearing was denied June 17, 1983. *See* Appendix E. Appellants filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit on July 15, 1983. *See* Appendix F.

Because the Ninth Circuit's judgment invalidated a state statute on federal constitutional grounds, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, is reprinted in full as Appendix G. The text of the original 1967 Act, 1967 Haw. Sess. Laws Act 307, is reprinted in relevant part as Appendix H. The relevant portions of the 1975 amendments to the Act, 1975 Haw. Sess. Laws Acts 184, 185, and 186, are reprinted as Appendices I, J, and K. The Hawaii Eminent Domain Law, Haw. Rev. Stat. ch. 101, is reprinted as Appendix L.

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution freezes our fiftieth state into its feudal past. A central legacy from that past is a system of land ownership concentrated uniquely and enduringly in the hands of a few. Under the land tenure system begun by King Kamehameha I in the eighteenth century, the crown granted lands to a hierarchy of chiefs who in turn oversaw a large class of tenants. By the mid-nineteenth century, subinfeudation had bred what King Kamehameha III denounced in his 1842 legal code as a multitude of landlords over the same tenants, each able oppressively to exact land, labor, and property from the tenants under his rule. In an unsuccessful attempt to cure these ills, the King divided all the lands of the kingdom among the crown, the government, the chiefs and the common people in the Great Mahele of 1848. But the chiefs received much of the land; the commoners, little. And the acquisition of vast tracts of land for plantation agriculture only increased this concentration of land ownership by the turn of this century.

As this lawsuit began, the land of Hawaii was still held in the tight grip of what the state's legislature and courts described as an oligopoly, or a quasi-monopoly.[1] On Oahu, where the State's population is concentrated, 22 major landowners owned 72.5% of the total land area,[2] with three major landowners owning 58.4% of the land privately held on Oahu—nearly 40% of its total area.[3] The Bishop Estate alone owned 22.1% of all the privately held land on Oahu—over 15% of its total area.[4] "It has been the policy of these [large] landholders to offer long-term leases to individual lessees, rather than to

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1 *See* 1975 Haw. Sess. Laws Act 185 § 1; *see also Midkiff v. Amemiya*, Civil No. 47103 (Haw. Cir. Ct. June 29, 1978) (Findings of Fact Nos. 118-119).

2 *See* 1975 Haw. Sess. Laws Act 184 § 1(a).

3 *See Midkiff v. Amemiya*, *supra* n.1 (Finding of Fact No. 96).

4 *See id.* (Finding of Fact No. 97). The Bishop Estate today owns 341,512 acres in the State of Hawaii—an area equivalent to the entire land area of Oahu.

offer residential lots in fee."[5] It was this residential leasehold system, run by the few large landowners, that the Hawaii legislature, after years of hearings, found injurious to the public welfare of Hawaii in manifold ways, and sought to remedy by enacting the Land Reform Act of 1967.

A. Why The Hawaii Land Reform Act Was Passed.

The barriers posed to widespread residential land ownership by the leasehold system in Hawaii were a continuing subject of acute legislative concern even before statehood.[6] As ultimately enacted in 1967,[7] the Land Reform Act chose condemnation of residential houselots for sale to the lessees living there as the mechanism for lowering these barriers. One other mechanism—requiring owners to give lessees options to purchase the land on which they lived—was expressly considered and rejected, precisely for the reason that it would have yielded less income tax advantage to the large landowners.[8]

The Hawaii legislature predicated the Land Reform Act, as well as the amendments to the Act and related legislation

5 *Midkiff v. Tom*, 483 F. Supp. at 65. A65.

6 A 1955 Territorial Senate resolution called upon the large estates to divest some of their highly concentrated land holdings for residential purchase. A 1959 Territorial law, reenacted after statehood as 1961 Haw. Sess. Laws Act 6, provided for state acquisition of private land through eminent domain for residential use. Several bills drafted by the state legislature in 1963 provided for options for lessees to purchase leased land. *See* 1963 Haw. House Bill Nos. 24 & 409. The findings underlying each of these acts and bills were substantially similar to those underlying the 1967 Act.

7 1967 Haw. Sess. Laws Act 307. A141-43. (Hereinafter "Act 307.")

8 As originally drafted, 1967 Haw. Senate Bill No. 1128 provided both for options to purchase, and for condemnation, as means by which lessees could acquire title to land. But special hearings at which representatives from the large landowning estates, as well as officials of the Internal Revenue Service, presented their views convinced the legislature that the option-to-purchase mechanism would cause the landowners substantially greater income tax liability than the condemnation mechanism. Expressly to prevent "the tax status of the landowners [from being] affected adversely," the Senate thus redrafted Bill No. 1128 in the form ultimately enacted as Act 307. *See* 1967 Haw. Senate Standing Committee Report No. 483. *See also* Haw. Rev. Stat. § 516-27.

enacted in 1975,[9] on extensive findings—after years of hearings and many volumes of testimony, reports, and studies—of acute and widespread social and economic hardship caused by the residential leasehold system. The legislature found that the small group of large landowners that owned more than three-fourths of the land[10] had persistently refused to sell such land in fee simple, instead leasing it for residential development.[11] This practice in turn led to a critical shortage of residential land for sale to a rising population with a rapidly increasing demand for single-family houselots, thereby driving up land prices and rents.[12] Thus short supply and inflated prices combined to deprive many thousands of Hawaii residents of an effective choice whether to live on land that they could call their own.[13]

Nor, the legislature found, would these conditions change were the land market left unregulated. *First*, without the reform statute the estates would continue to have strong disincentives to sell their land—both because of restrictive indentures in their trusts, and because of the tax liability such sales would incur.[14] *Second*, the sheer inequality of bargaining power created by the "oligopolistic market" enabled the lessors to exact "exorbitant rents," so that the shortage of fee sales would continue to be a situation "the free market cannot correct."[15]

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9 1975 Haw. Sess. Laws Acts 184 (A144-46) and 186 (A152-57) amended the Land Reform Act, and Act 185 (A147-51) provided for related controls on leasehold rent renegotiation. (Hereinafter, "Act 184," "Act 185," and "Act 186.")

10 Act 307 § 1(c).

11 Act 307 § 1(c)-(e); Act 184 § 1(b); Act 186 § 2(a)(1)-(2).

12 Act 307 § 1(d) & (g); Act 184 § 1(d)(1)-(3); Act 185 § 1; Act 186 § 2(a)(2)-(4).

13 Act 307 § 1(f)-(g); Act 184 § 1(c); Act 186 § 2(a)(3)-(4).

14 Act 307 § 1(e). *See also* n.8 *supra*.

15 Act 185 § 1. *See also* Act 184 § 1(d)(5)-(6).

The legislature intended the Land Reform Act to redress the leasehold system's injury to the public in at least four basic ways: *first*, by increasing the availability and turnover of land for single-family residential acquisition; *second*, by "dispers[ing] ownership of fee simple residential lots to as large a number of people as possible"[16]; *third*, by reducing the disproportionate market power of the few large landowners; and *fourth*, by containing the various forms of social disruption and expense the leasehold system might trigger.[17] The legislature concluded, as it had to on the record before it, that the Act would realize public purposes and put land to public use.[18]

B. How The Hawaii Land Reform Act Works.

Any lessee living on a single-family residential land lot of no more than two acres,[19] within a development tract at least five acres in size,[20] may file an application with the HHA to purchase a fee simple interest in the lot.[21] To be eligible, an applicant must, among other things, own a house on the lot,

16 Act 307 § 1(j).

17 By inflating land prices and rents, the leasehold system had escalated the cost of living in Hawaii--so greatly, the legislature found, as to threaten the ability of many Hawaii residents to maintain a decent standard of living. Act 186 § 2(a)(6), (7) & (9). It thus threatened to cause the state additional public expense to feed and clothe as well as house those residents who could no longer afford to do so themselves. For example, the legislature specifically found that, when lease rents took huge upward jumps upon expiration of a lease term, the now-elderly residents who had held onto the leasehold for its full term were, "by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing," and forced to drop into the already swelling ranks of those needing to be publicly housed. Act 185 § 1; *see also* Act 184 § 1(e). Furthermore, the legislature expressed its fear that the strictures of the leasehold system could cause lawlessness "irreparably rend[ing] the social fabric." Act 186 § 2(a)(7).

18 Act 307 § 1(j); Act 186 § 2(a)(4)-(13).

19 Haw. Rev. Stat. § 516-1(11). Chapter 516 is reprinted at A109-40.

20 *Id.* § 516-1(5).

21 *Id.* § 516-22.

show proof of ability to pay the HHA for a fee interest in the lot, and not own residential land elsewhere nearby.[22] If eligible applications are filed by the lessees of at least 25 lots or half the lots in the tract (whichever is less), the HHA holds a public hearing, upon public notice, to determine whether acquisition by the state, through condemnation or purchase under threat of condemnation, of fee simple interests in lots in all or part of the tract, will "effectuate the public purposes" of the Act.[23]

If the HHA finds that those public purposes would be served, it designates some or all of the lots in the tract for acquisition.[24] The HHA then acquires the fee interests in the designated lots, either at the conclusion of condemnation proceedings brought under the Eminent Domain Law,[25] or by settling with the landowner directly.[26] By either method, the HHA acquires on behalf of the state the former fee owner's full "right, title, and interest" in the lots.[27]

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22 *Id.* § 516-33(3), (4), & (7).

23 *Id.* § 516-22. The Act's original requirement that the HHA also find a shortage of fee simple lots in the surrounding county (unless certain other conditions were present), Act 307 § 11, was deleted in 1976, 1976 Haw. Sess. Laws Act 242 § 2.

24 The Act was amended in 1975 to permit designation not just of entire tracts but of selected lots within a tract. 1975 Haw. Sess. Laws Act 184 § 2(6).

25 Haw. Rev. Stat. ch. 101. A158-78. Eminent domain proceedings are brought in the Hawaii circuit courts. *Id.* § 101-10. If the condemnee's answer to the complaint denies that a taking will be for a public use, that issue may be immediately tried to the judge, and an interlocutory appeal from the judge's ruling taken directly to the Hawaii Supreme Court. *Id.* § 101-34. Compensation is determined at a valuation trial with a right to a jury. *Id.* § 101-23.

26 In either case, compensation must equal the fair market value of the owner's leased fee interest as of the date of designation. *Id.* §§ 516-1(14), 516-24. The adequacy of compensation is not at issue in this case.

27 *Id.* § 516-25. Title passes only after payment, *see id.* § 101-26. The HHA is authorized to finance acquisitions with funds raised by issuance of general obligation bonds or by amounts advanced from general State funds. *Id.* § 516-45.

Having acquired title, the HHA must sell its interest in a lot within 60 days to a lessee if the lessee has applied, qualified, and executed a contract with the HHA to purchase that lot.[28] The HHA may lend such an applicant up to 90% of the purchase price at a reasonable rate of interest, subject to certain restrictions—including that the HHA have the right to repurchase the lot if the borrower decides to resell it within ten years.[29] If the HHA does not sell a lot it acquires to a lessee residing there, it may lease it or sell it to anyone on public notice,[30] subject to a general prohibition against its operation for profit,[31] and subject to all other rights provided to lessees by the Act.[32] In any case, the HHA may not sell in fee simple to any one purchaser, or lease to any one lessee, any more than one lot.[33]

C. State Proceedings Before And During This Federal Action.

The machinery of the Land Reform Act had been set in motion by the state against various tracts owned by the Bishop Estate long before the Estate filed the federal complaint herein on February 28, 1979, and has continued to operate against those tracts and many others at all times since. Two examples in particular illustrate this continuum.

First, the taking of Wai-Kahala Tract "H" had already been found by the HHA to effectuate the public purposes of the Act, and that tract had been designated for acquisition by the HHA on October 20, 1978, following a public hearing held on April 22, 1977—a full 22 months before the Estate went to federal court. This designation, moreover, had been appealed

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28 *Id.* § 516-30.

29 *Id.* §§ 516-34, 516-35.

30 *Id.* §§ 516-28, 516-29, 516-31.

31 *Id.* § 516-32.

32 *Id.* §§ 516-61 to 516-70 (Rights of Lessees).

33 *Id.* § 516-28.

to a Hawaii circuit court, which had remanded the case to the HHA for further findings regarding public purpose.[34]

Second, the Kamiloiki Valley tract, which ultimately became the test vehicle for an extensive, just-completed state court trial of public use or purpose, had already been the subject of a public hearing before the HHA on February 22, 1979. Prior to that hearing, and fifteen days before filing this federal action against the HHA, the Bishop Estate submitted to the HHA a written opposition, dated February 13, 1979, in which it charged that chapter 516 violated the constitutions of Hawaii and of the United States because, among other things, it authorized takings for no public use or purpose. The Estate argued that the HHA should therefore refuse even to designate Kamiloiki Valley or other tracts. The HHA entertained this argument but ultimately rejected it, finding that the acquisition of Kamiloiki would serve the Act's public purposes and designating it for condemnation on October 17, 1980. Condemnation proceedings, filed in state court November 10, 1980, then moved to the valuation phase, in which the jury rendered a just compensation verdict on November 3, 1982.

Meanwhile, the first two appeals by major landowning estates from trial court determinations that tract condemnations under the Act would serve a public use and purpose reached the Supreme Court of Hawaii. On November 10, 1982, that court reversed and remanded, declining to reach the federal or state constitutional issues it deemed "of first impression," and "of vast public import," without having before it an extensive record of findings—including findings about "what the legislature had before it when it enacted what is now Chapter 516 and the amendments thereto."[35] It therefore instructed the lower courts to conduct further trials on public use and purpose. The Kamiloiki proceeding was determined to be the appropriate case for that public use trial. After extensive

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34 *See Wai-Kahala Tract "H" v. Midkiff*, Civ. No. 55837 (Haw. 1st Cir. Nov. 29, 1978), subsequently settled.

35 *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (1982) (per curiam). *See also Hawaii Housing Authority v. Brown*, No. 8489 (Haw. Nov. 10, 1982).

hearings at which voluminous evidence was presented, the state trial court determined that condemnation of Kamiloiki Valley would serve a public use and purpose and that the Act, both on its face and as applied, was fully constitutional.[36] After it is embodied in a final judgment, that ruling will presumably be appealed to the Hawaii Supreme Court by the Bishop Estate. Numerous other condemnation actions likewise proceeded throughout this federal action.[37]

D. The Federal Proceedings Underlying The Judgment Below.

The Bishop Estate filed a complaint against the state defendants in the United States District Court for the District of Hawaii on February 28, 1979—during the pendency of HHA proceedings in the Kamiloiki Valley and other cases, and on the eve of arbitration proceedings in the Wai-Kahala Tract "H" case. The Estate alleged that the Hawaii Land Reform Act was unconstitutional on its face, among other things because it deprived "the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Complaint ¶ 14.) The state defendants' answer not

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36 *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408 (Haw. 1st Cir. July 8, 1983) (oral ruling of Grieg, J.)

37 The federal district court below specifically refused to enjoin designation or condemnation proceedings under the Act. *Midkiff v. Tom*, 471 F. Supp. at 886. A104. By November 1979, when the district court heard the first motions for summary judgment in the present case, the HHA had held public hearings on the designation of nearly 7000 of the Estate's lots, and had initiated two condemnation actions in addition to Tract "H"—all of which were settled during the federal district court proceedings. By April 3, 1980, when the district court heard the remaining motions for summary judgment, the HHA had held public hearings concerning 1500 additional lots of the Estate, and had filed another condemnation action in state court, which was settled after the district court's final judgment of June 10, 1980. Eighteen more condemnation actions had been filed in state court against Bishop Estate lots by the time the appeal below was argued in the Ninth Circuit. As of the filing of this Jurisdictional Statement, there are pending in state court 24 condemnation actions involving over 3500 lots. The Bishop Estate is seeking from the Ninth Circuit injunctive relief against all such state proceedings under the Act.

only denied that allegation but also objected to any federal judicial intervention before the state's courts had had a chance to provide "authoritative interpretations" of the Act "which may preclude the necessity for a decision of the constitutional issues raised by the Complaint." (State defendants' Answer ¶ 18.)

After a hearing on April 24-27, 1979, the district court refused to grant the Estate any preliminary injunctive relief from designation or condemnation proceedings.[38] On December 9, 1979, the district court granted partial summary judgment to the defendants and intervenors-defendants, holding the Act constitutional under the public-use requirement of the Fifth and Fourteenth Amendments. The district court found the goals of the Act well within the bounds of the state's police power,[39] and the means the legislature chose to serve those goals in no way arbitrary, capricious, or selected in bad faith.[40]

On appeal from the district court's judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, in an opinion announced nearly three years after appeal was taken. Relying principally on general statements by Madison and Hamilton and on the theories of such seventeenth- and eighteenth-century writers as Grotius and de Vattel rather than on any twentieth-century judicial precedent, 702 F.2d at 790-93 (A5-10), the court's opinion, per Alarcon, J., curtly dismissed years of painstaking legislative investigation and the voluminous findings to which such study led, *see* pp. 2-4 *supra*, as mere "rationalizations" for "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit," 702 F.2d at 798 (A21). Such "appease[ment] [of] the desires of a landless majority to own residential land," *id.* at 793 (A10), the court

38 *Midkiff v. Tom*, 471 F. Supp. at 886. A104. The district court did, however, preliminarily—and later permanently—enjoin the use of the mandatory compensation formulas and arbitration-of-compensation procedures then provided for by the Act. Defendants and intervenors-defendants did not appeal this ruling, and the formulas and arbitration provisions have since been repealed by the legislature, 1980 Haw. Sess. Laws Act 107.

39 483 F. Supp. at 67-70. A70-75.

40 483 F. Supp. at 69, 70. A73-74, 75. Final judgment was entered by the district court on June 10, 1980.

announced, was "majoritarian tyranny," *id.* at 790 (A5), which inherently violated "the private property rights of the landed minority," *id.* at 798 (A21), and thus transgressed on its face "the public use limitation of the fifth and fourteenth amendments," *id.* (A21).

Joining the court's opinion, Judge Poole also wrote separately to explain why he thought it "manifestly" correct. *Id.* at 799. A21-22. While doubting the Act's efficacy and necessity, *id.* at 804-07 (A32-38), he agreed that its fatal flaw lay simply in its facial operation to "prefer[] B's ownership of the land to A's," *id.* at 807 (A38). Whatever social gain might be wrought by effectuating such a preference, he reasoned, only a "Huxleyan advent" so sweeping as to overturn "Magna Carta" could validate even a compensated " 'redistribution' of the property of others." *Id.* A37.

Neither member of the majority thought abstention called for. *Id.* at 789-90 n.1 (A2-4); 799-803 (A22-31). Judge Ferguson, dissenting, concluded "that instead of reaching the merits . . . , the majority should have abstained in favor of ongoing state judicial processes," and held that, in any event, Hawaii's "land reform program . . . does not result in an unlawful taking of property." *Id.* at 819. A63.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE NINTH CIRCUIT'S INVALIDATION OF HAWAII'S LAND REFORM ACT USURPED STATE LEGISLATIVE POWER IN A MANNER UNPRECEDENTED IN THIS CENTURY.

Wholly ignoring the elaborate findings of Hawaii's legislature explaining why land reform was a public necessity, the court below announced a wooden and inflexible rule: a state's use of its taking power to transfer land from one group of owners to another is per se invalid as a taking for a private purpose. This is not, and could not be, the law. For this Court—having long ago forbidden federal courts from sitting as superlegislatures to second-guess the wisdom of state socioeconomic measures—has repeatedly upheld as rational state laws that, through coercive regulation, enhance the value of

the property of one group at the specific expense of another. *See* I.B *infra*. Indeed this Court has long held that such laws *must* be upheld so long as their fulfillment of legitimate public purposes is even "debatable." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (emphasis added).

Had Hawaii's legislature chosen to deploy the police or taxing powers rather than the taking power to attack the residential leasehold system that it found, for many reasons, injurious to its public—for example, by requiring option-to-purchase provisions in long-term leases—there can be no serious question that a federal court would have been bound to uphold that exercise of power. For the ends that Hawaii's legislature designed the Land Reform Act to serve are manifestly public and significant, *see* I.A. *infra*, and no regulatory mechanism that might debatably achieve those legitimate public ends could be invalidated. Rather, the *only* reason the court below gave—and could have given—for its strict scrutiny of the Act's public purposes was that the Act authorizes transfers of land between private parties under the *taking* power.

But no closer scrutiny can properly be applied by a federal court to a state legislative determination that a *taking* will serve a public purpose, than to a state legislative decision that a redistribution through *coercive regulation* (or through taxation) will serve a public purpose. "For the power of eminent domain is merely [a] *means*" to an otherwise legitimate public end, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis added), and the principle that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . admits of no exception merely because the power of eminent domain is involved," *id.* at 32. If anything, state taking legislation coupled with just compensation merits even *less* scrutiny for public purpose than does redistributive state action under the police power or the taxing power, because such taking legislation does not even redistribute aggregate wealth: the state must back up any determination of public necessity for a *taking* with a promise of full and fair *compensation* for the property taken. *See* I.C *infra*. Accordingly, this Court has held throughout this century that when a legislature has found the ends to be served by a taking

public, "[i]ts decision is entitled to deference unless it is shown to involve *an impossibility*." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (emphasis added).

The Ninth Circuit's application of the strictest scrutiny when all relevant precedent called for the most minimal, and its attempt—in a throwback to an era long since past—to substitute *its* view of the public good for the Hawaii legislature's view, must therefore be reviewed and reversed; an affirmance of the ruling below would mark this as the very first twentieth-century invalidation by this Court of a legislature's determination that a particular exercise of the power of eminent domain, with just compensation, serves a public purpose.

A. The Hawaii Land Reform Act Is Classic Socioeconomic Legislation, Designed To Serve Basic Public Purposes.

Although the history of Hawaii's land ownership system is unique, the purposes the Hawaii legislature intended the Land Reform Act to serve—purposes evident on the face of the extensive legislative findings expressed in the Act—are all matters of typical, and by now traditional, legislative concern. Indeed, were the asserted purposes of the Act to be found illegitimate, a vast array of regulatory schemes—ancient and modern, state and federal—would likewise be called into question.

First, the Act was designed to free the alienability and turnover of land in Hawaii from the restrictive grip of the long-term lease system. Removing restraints on alienation has long been a basic purpose of Anglo-American statutes as well as of many common law property rules. For example, Parliament under Edward I enacted *Quia Emptores* in 1290 to empower tenants to alienate land freely so long as, rather than subinfeudating, they substituted their grantees for themselves in order to preserve their overlords' feudal incidents. Similarly, Pennsylvania and Maryland, in which systems of perpetually renewable long-term land leases had prevailed since the first colonial crown grants, enacted legislation to enable lessees to acquire freely alienable title to the land they lived on—Pennsylvania in 1855 by providing that any ground rents unpaid and undemanded for 21 years would be extinguished, and Mary-

land in 1888 by requiring that any long-term lease include an optional right of redemption of the fee by the lessee.[41]

Second, in addition to allowing any particular land parcel to be more freely transferred *vertically* from landowner to landowner over time—instead of being trapped perpetually in the hands of a single landowner—the Land Reform Act was designed to spread land ownership *horizontally* by enabling more Hawaii residents to acquire the land on which they live. Maximizing opportunities throughout American society for people to own their own homes is a purpose central to a complex of federal programs never challenged for being insufficiently public in purpose—for example, mortgage financing through the Federal Home Loan Bank System and the Federal National Mortgage Association, mortgage insurance subsidized by the Federal Housing Administration, favorable tax treatment for home ownership under the Internal Revenue Code, and construction of various forms of public housing.

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41 Laws aimed at reducing restrictions on the alienability of land are but special examples of the general legislative power to remedy public injury caused by particular patterns of landholding. Thus this Court upheld the Pennsylvania law as a legitimate exercise of the police power for "the general convenience," *Wilson v. Iseminger*, 185 U.S. 55, 60-61 (1902), and the Maryland Supreme Court found the Maryland law a sound exercise of public policy based on "a well-grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the City of Baltimore," *Stewart v. Gorter*, 16 A. 644, 645 (Md. 1889). The Hawaii legislature found the residential leasehold system no less injurious to the people and the economy of Hawaii.

Nor is it beyond the scope of the police power to remedy such injury by reallocating the bundle of property rights in any given parcel of land. The great Statute of Uses, enacted by Parliament in 1536 under Henry VIII, for example, curbed two mischiefs of the "use" system—the non-registry of title to land, and the evasion of feudal incidents owed feudal lords, including the King, by those who conveyed uses to their lands—by simply conferring full legal ownership of land on those who had held mere uses in that land. And as this Court stated in *Wilson v. Iseminger*, a state may promote the general convenience not only through such obvious devices as safety laws or divorce laws, but also through laws that redefine property rights: " 'estates held in joint tenancy and in common may [under a state's "police power"] be divided among the tenants, even by conversion and sale; life estates may be separated from each other; qualified inheritances expanded into absolute fee, and contingent and executory interests extinguished.' " 185 U.S. at 61.

Third, as the flip side of multiplying opportunities for land ownership, the Act is designed to disperse the extraordinarily concentrated market power of a small oligopoly of landowners in Hawaii, and to increase the bargaining power of lessees in relation to those landowners. Breaking up concentrated economic power so as to enhance competition, efficiency, and the functioning of the market is the classic purpose of the antitrust laws, and the states are clearly empowered to order monopolists or oligopolists to divest their property. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 & n.13 (1978). Not since such decisions as *Coppage v. Kansas*, 236 U.S. 1 (1915), which suggested that inequalities of bargaining power are "but the normal and inevitable result" of liberty of contract, *id.* at 17-18—decisions thoroughly repudiated by this Court for the last half-century[42]—has it been doubted that regulation tending to offset the unequal bargaining power of employer and employee, or of landlord and tenant, is well within ordinary legislative authority. Nor is that authority in any way diminished merely because such regulation may disappoint the expectations built up by the disproportionate market power previously enjoyed by the landlord; many indisputably public and uncontrovertibly legitimate rent-control, condominium-conversion, and mandatory option-to-purchase ordinances do just that.

Fourth, in addition to being designed to reform the residential land market, the Act is designed to serve a variety of other purposes important to the general public welfare of the state—to the "moral, social, economic, and physical well-being of the community," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952), as well as to its "spiritual" and "aesthetic" values, *Berman v. Parker*, 348 U.S. at 33. It is designed—like much fiscal and monetary policy—to stabilize the cost of living by curbing land prices and rents. It is designed to prevent

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42 It is not clear that the court below took any notice of the demise of *Coppage*, however, for the majority opinion—in a passage reminiscent of that case and devoid of any modern authority—cites Madison's statement, " 'In all civilized societies, distinctions [of property] are various and *unavoidable*,' " as authority for its invalidation of Hawaii's law. *See* 702 F.2d at 791 (emphasis added). A7.

families from having to watch as their lifelong homes are razed by the bulldozers of landlords with more profitable uses of the land in mind. It is designed to avoid whatever social disruption or disobedience to law the harsh strictures of the residential leasehold system might inspire. It is designed to reduce social expenditures needed by casualties of the residential leasehold system, such as the elderly lessees who must be publicly housed because they cannot afford their renegotiated rents. And it is designed to give Hawaii residents the opportunity to acquire and enjoy full equity in their homes and homesites, to pass on to their children or to sell as they please—an opportunity that might well keep some from abandoning the state in desperation, or inspire others to build more enduring residences, secure in the knowledge that the land on which they have made their homes cannot be pulled out from under them at the end of decades-long leases.

"The concept of the public welfare is broad and inclusive," *Berman v. Parker*, 348 U.S. at 33; each of these purposes of the Hawaii Land Reform Act falls well within its bounds. And the *combination* of these purposes yields not merely a rational, but a compelling, justification for the Act.

B. Neither The Economic Benefit Conferred On One Group, Nor The Economic Harm Inflicted On Another, Can Invalidate Regulations A Legislature Could Rationally Have Believed Would Advance Such Public Purposes.

The court below not only wholly ignored the manifold purposes underlying the Hawaii Land Reform Act, but also wholly ignored the federal constitutional standard by which all state socioeconomic legislation is to be judged. Those challenging socioeconomic legislation—whether on substantive due process or on equal protection grounds—must show "that the legislative facts on which [a law] is apparently based could not reasonably be conceived to be true by the [legislature]." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). So long as "the question is at least debatable," *United States v. Carolene Products Co.*, 304 U.S. at 154, those who attack economic legislation as not reasonably calculated to advance legitimate state goals "cannot prevail," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S.

456, 464, 470 n.12 (1981).[43] The court below gave no reason for so entirely disregarding this standard other than to suggest that, when the state takes property from one set of private parties to the immediate benefit of another, that transfer is per se invalid as serving a private purpose—notwithstanding payment of full compensation. *See* 702 F.2d at 798 (A21); *id.* at 806 (A36).

Even *uncompensated* redistribution of economic advantage through *regulation*, however, is not invalidated, nor even subjected to higher than minimal scrutiny, merely because it imposes economic costs on, or denies economic opportunities to, "A" in order that "B" may gain. Virtually all of the very cases that reiterate the minimal rationality standard involved state regulations that destroyed or impaired one set of investment-backed property interests in order to protect or enhance another that the legislature deemed it in the public interest to prefer. In *Miller v. Schoene*, 276 U.S. 272 (1928), the economic benefit conferred on apple owners at the direct expense of cedar owners did not invalidate a state regulation requiring the uncompensated destruction of infected cedar trees in order to save nearby apple trees. Indeed, Justice Stone wrote for a unanimous Court that

> [i]t will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvi-

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43 *Accord, United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-78 & n.10 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 124-25; *New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam); *Ferguson v. Skrupa*, 372 U.S. 726,729-31 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. at 425 (Court's "recent cases . . . leave debatable issues as respects business, economic, and social affairs to legislative decision"). Furthermore, contrary to the implications of the concurring opinion below, *see* 702 F.2d at 804-806 (Poole, J.) (A32-36), it is clear that "whether *in fact* the provision will accomplish its objectives is not the question: the [Fourteenth Amendment] is satisfied if . . . the . . . [state] legislature rationally *could* have believed that . . . [it] would. . . ." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466; *Vance v. Bradley*, 440 U.S. at 112.

ous that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.

Id. at 279.

Regulation has similarly been upheld on a minimum-rationality standard against Fifth and Fourteenth Amendment challenge notwithstanding the fact that it conferred a distinct economic advantage on, for example, truck owners advertising only their own wares at the expense of those seeking to advertise the wares of others,[44] on eye doctors at the expense of opticians,[45] on lawyers at the expense of debt adjusters,[46] on established pushcart food vendors at the expense of "vendors of more recent vintage,"[47] on retail car franchisees at the expense of automobile manufacturers seeking to open competing franchises,[48] on railroad workers connected with the in-

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44 *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a city ordinance forbidding advertising on trucks except by the truck owner of his own goods or services, on the ground that local authorities may well have concluded that the latter posed less risk of distraction to traffic).

45 *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (upholding a state statute forbidding an optician from fitting or duplicating lenses without a prescription from an opthamologist or optometrist, on the ground that the legislature might have concluded that a prescription was necessary often enough to require one in every case).

46 *See Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (upholding a state statute forbidding debt adjusting except by those authorized to practice law, on the ground that the legislature could have concluded that the business of debt adjusting lacked social utility).

47 *See New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (per curiam) (upholding a city ordinance banning from the historic Vieux Carre all vendors except two who had operated there for over eight years, on the ground that the city could reasonably decide that the two exempted vendors had greater reliance interests or had themselves become part of the charm of the district).

48 *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding a state statute permitting existing franchisees to trigger administrative review of prospective manufacturer dealerships, on the ground that the legislature was "empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchi-

dustry as of 1974 at the expense of those with similar experience lacking so recent a connection,[49] and on the paperboard industry at the expense of the plastic container industry.[50] In short, this Court has long since decisively rejected the losing argument made before it by the cedar owners in *Miller v. Schoene*:

> We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another.

276 U.S. at 275 (argument of counsel).

Thus, had Hawaii's legislature chosen to attack the residential leasehold system by means of simple regulation—for example by imposing, as it considered doing and as did Maryland long ago, a mandatory option-to-purchase requirement on all long-term leases—the proposition that the landowners lost economic advantage in order that the lessees might gain would not invalidate it. If the landowners might thus have lost one "political battle," they could have been expected to win others in the ordinary give-and-take of the "legislative forum," *see United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).[51] As Justice White wrote for the Court in

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sees where necessary to prevent unfair or oppressive trade practices," *id.* at 107, or to redress "disparity in economic power" between the two, *id.* at 111 (Marshall, J., concurring)).

49 *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177-78 (1980) (upholding an Act of Congress eliminating dual retirement benefits for workers without a 1974-or-later connection with the industry, on the ground that Congress could have concluded that such funds ought to be used first for those more recently working as railroaders).

50 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (upholding state ban on the sale of milk in nonrefillable plastic but not in nonrefillable paperboard containers, on the ground that the legislature could rationally have concluded that such a ban might have environmentally desirable effects).

51 Indeed, the very fact that Bishop Estate lobbied, for federal tax reasons, against the Maryland law in favor of the condemnation law that was

Vance v. Bradley, "The Constitution presumes that, absent some reason to infer antipathy, . . . decisions [if "improvident"] will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 440 U.S. at 97. To apply strict scrutiny to such a regulation would be to treat as a discrete and insular minority a class distinguished only by its wealth in Hawaii landholdings.[52]

And it would most assuredly make no sense to hold that eminent domain, *with* compensation, may sometimes be forbidden even though a police regulation having the same purposes and effects, but *lacking* in compensation, might be upheld. For that would perversely press the state into achieving by uncompensated regulatory action what federal judges would prevent the state from accomplishing by compensated exercises of eminent domain. The upshot would be *less* protection for the private interests adversely affected, *and* reduced flexibility for the state—a clear loss to all concerned. As detailed in I.C *infra,* the relevant and well-settled law leads to no such absurd result.

C. Whether A State's Exercise Of The Taking Power Serves A Public Purpose Is Likewise Reviewable By A Federal Court Only For Minimum Rationality.

Even where a regulation under the police power so greatly diminishes "A" 's economic advantage as to transform it into a taking and to require compensation, *see Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922), the fact that "B" may be the immediate beneficiary of the regulation—as were the surface dwellers in *Mahon* from the state's ban on sub-dwelling coal mining—cannot condemn that statute as private in purpose. Nor can the mere fact that property taken by eminent domain is transferred in the first instance to private beneficiaries condemn that taking—automatically, or even presump-

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ultimately enacted, *see* n.8 *supra,* demonstrates that its voice was heard—and heeded— in the state's legislative process.

52 The Ninth Circuit seems to have done just that. *See* 702 F.2d at 798 (need to protect "the landed minority"). A21.

tively—as having only a private purpose. *Berman v. Parker*—in which this Court held that, as in the case of all socioeconomic legislation, "[t]he role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one," 348 U.S. at 32--clearly establishes this proposition. For that decision, by a unanimous Court, upheld a taking of a department store's land for transfer to a private housing developer. Flatly rejecting the argument "that this makes the project a taking from one businessman for the benefit of another businessman," Justice Douglas wrote that, once the public purpose of the taking is established, the use of the taking power is just another means to that end, and all decisions about *how* to deploy that power—such as whether to transfer the property to a private or public redeveloper, or whether to condemn on an area-wide basis or on a site-by-site basis—are for the legislature alone to resolve. *Id.* at 33-34.

Long before *Berman v. Parker*, moreover, this Court had laid to rest any notion that literal "use by the general public" was a prerequisite to a finding of public purpose in a taking of property, and had upheld numerous takings whose immediate beneficiaries were one or more private individuals. *See, e.g., Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 531 (1906); *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896). *See also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 323 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946); *Government of Guam v. Moylan*, 407 F.2d 567, 568 (9th Cir. 1969).[53] *See generally* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

The standard of review evolved in these cases, and in cases involving the federal taking power, is one of "well-nigh conclusive" deference, *Berman*, 348 U.S. at 32, to any legislative determination that a taking will serve a public purpose, so long as that determination is not so manifestly irrational as to

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53 The Ninth Circuit's decision below is squarely in conflict with both these precedents, as well as with this Court's holding in *Berman v. Parker*.

involve "an impossibility." *Old Dominion Co. v. United States*, 269 U.S. at 66; *see United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946).[54] The only reason given by the court below for its utter disregard of this standard in this case was its view that, except for certain "historically accepted" situations supposedly fixed for all time by stare decisis, *see* 702 F.2d at 794, 795-96 (A12, A14-16),[55] such deference need apply only when takings effect concrete changes in the use or possession of the land taken, *id.* at 794-95 (A13-14).

This mechanical view, however, has no basis whatever in the case law, and indeed blindly ignores the fact that, in some circumstances, it is *only* compensated reallocation of *ownership* in land that can effect the public benefit sought. The Statute Of Uses, after all, changed neither use nor possession, but merely rearranged the bundle of legal rights to each parcel of land it affected. *People of Puerto Rico v. Eastern Sugar Associates*, furthermore, upheld a land redistribution program that, among other measures, created homestead rights in those squatting on the land. *See* 156 F.2d at 319, 325. And in perhaps the most analogous setting of all, the Maryland Supreme Court rejected the argument that lessees' options to purchase their leased land—options that, if exercised, change ownership, not use or possession—per se confer only private benefit: "it was the *system* of these long leases, irredeemable until the end of the term, that the legislature wished to break up, *rather than any special consideration for the lessees*, that caused the [Maryland] act," *Stewart v. Gorter*, 16 A. at 645 (emphasis added).

In any case, only the most short-sighted could view the Hawaii Land Reform Act as failing to change the use of land

54 These two decisions reviewed takings authorized by Congress. It is clear, however, that at least as much deference must be paid to state legislatures, in light of the well-settled principle that "a local legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity" and the general welfare. *People of Puerto Rico v. Eastern Sugar Assoc.*, 156 F.2d at 324.

55 It is ironic how quickly the court below, having stressed the importance of judicial oversight of public use, abdicated that self-proclaimed responsibility by reducing the eminent domain precedents to a rigid set of categories immune to historical evolution.

in Hawaii. Even the court below, after all, did not deny that the Act shifts land out of investment use for the speculative purposes of absentee landowners into personal use for the residential purposes of its occupants. *See* 702 F.2d at 796-97. *Cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Viewed from a long-term perspective and in macrocosm, such a shift could make an enormous difference to Hawaii's development and overall pattern of land use. Land distributed in small parcels among many owners, for instance, is unlikely to be pooled for large investment projects such as a single large landowner might wish to construct.[56]

Nor can there be any other justification, on the facts of this case, for the Ninth Circuit's radical departure from established standards of judicial deference to legislative determinations that a taking will serve a public purpose. For even if heightened scrutiny should attach to takings that physically dispossess people from land they own and occupy,[57] *no* such dispossession is involved here. On the contrary, the very purpose of the Act is to *enhance* the security of those who live on the land by enabling them to buy it.

And even if heightened scrutiny should attach to takings of property whose immediate beneficiaries are a few individuals or corporations identifiable in advance, posing risks of legislative favoritism,[58] such a standard is altogether irrelevant here. For the immediate beneficiaries of the Hawaii Land Reform

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56 The Bishop Estate itself, in fact, is evidently withholding altogether from sale to current leaseholders certain beachfront properties for which "it apparently wants to keep open such future options as resort development." The Honolulu Advertiser (July 20, 1983) at A-3, col.2.

57 This was an argument made by the dissenters in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation of a residential neighborhood for industrial redevelopment). *See id.* at 474 (Ryan, J., dissenting) (a taking that compels people to leave "a lifelong home and community" should be scrutinized more closely than mere taxation).

58 This argument was also made by the dissenters in *Poletown*, where General Motors Corporation was the immediate beneficiary. *See id.* at 468-70 (Ryan, J., dissenting); *id.* at 463-64 (Fitzgerald, J., dissenting).

Act are the class of *all* residents who are or who become land lessees of small parcels, or to whom the HHA otherwise sells parcels that it condemns—a general and open class whose members are *not* identifiable in advance.

It follows that the Ninth Circuit's facial invalidation of the Land Reform Act was as unwarranted as it was unprecedented—an unjustifiable blow both to the legitimate land-use aspirations of Hawaii's people, aspirations the state legislature aptly described as the "American dream,"[59] and to the sovereign lawmaking authority of their elected legislative representatives.

II. IF APPELLEES' FEDERAL CONSTITUTIONAL CHALLENGE WERE TO BE DEEMED COLORABLE, THEN SETTLED PRINCIPLES OF FEDERAL JUDICIAL RESPECT FOR STATE PROCESSES WOULD REQUIRE ABSTENTION OR DISMISSAL.

If, as appellants contend (*see* I *supra*), the federal constitutional claim against the Hawaii Land Reform Act "is utterly without substance," then perhaps its "avoidance . . . [could not] justify a federal court's failure to exercise its jurisdiction" to reject that claim. *See Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 34 (1959) (Brennan, J., dissenting). Were this Court to agree with that assessment of the merits, then it might follow that "[t]he district court acted correctly in declining to abstain from the exercise of its jurisdiction," 702 F.2d at 790 n.1 (A4), and in proceeding summarily to reject the federal constitutional attack upon the Land Reform Act.

But no such view can support the Ninth Circuit's disposition of the abstention issue. For, far from regarding the federal challenge as too frivolous to make abstention appropriate, that court deemed the challenge so weighty as to compel facial invalidation of the Act—at the very moment the state's courts were being pressed by appellees to find that the Act either does not authorize the condemnation of their lands or, if it does, that it takes their lands for no "public use," and thus contravenes Article I, Sec. 20, of the Hawaii Constitution, which

59 1967 Haw. House Standing Committee Report No. 827.

provides that "[p]rivate property shall not be taken or damaged for public use without just compensation."

The meticulous and insistent way in which the state's courts have both required administrative hearings by the HHA into this "public use" issue and re-examined that issue in judicial trials casts grave doubt on the surmise of the court below that Hawaii's "public use" requirement is but a " 'mirror image' " of the Fourteenth Amendment's due process clause. 702 F.2d at 800 (Poole, J., concurring) (A24); *see also id.* at 789-90 n.1 (A3-4). In this case, unlike *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572, 597-98 (1976), both the relevant text of the state's statutory and constitutional law,[60] and the practice to date under both, preclude any confident prognosis that Hawaii's judges and administrators will, under state law as authoritatively construed by the Hawaii Supreme Court, treat the findings of the Hawaii Legislature as deferentially as a federal court is bound to do.[61] On the contrary, as matters now stand, it remains entirely possible that a state appellate adjudication—one arising out of any of several dozen pending proceedings—will overturn the Hawaii Legislature's and/or the HHA's findings, either wholesale or as applied to the tracts held by appellees, and will thereby moot appellees' federal claims so as to render

60 The phrase "public use," appearing both in Hawaii Rev. Stat. § 516-83(a)(12), and in Hawaii Const. art.I, § 20, appears nowhere in the Fourteenth Amendment, whereas the phrase "equal protection of the laws," 426 U.S. at 598 (quoting Puerto Rico Const. art.II, § 7), obviously does. That this Court in *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417 (1896), "incorporated" a "public use" requirement of sorts into the due process clause hardly converts the latter into a carbon copy of state statutory and constitutional limits upon the eminent domain power. *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 600-08 (1949) (nineteenth-century state courts developed narrow definitions of "public use" to protect private property from state takings that were rapidly increasing as industrial development accelerated).

61 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 461 n.6 (states are "free to allocate the lawmaking function to whatever branch of state government they may choose," and thus to delegate to their own agencies or courts as much of a legislative second-guessing function in enforcing state, albeit not federal, constitutional norms as they wish); *cf. id.* at 479-81 (Stevens, J., dissenting).

their acceptance by the court below wholly advisory. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

Given the risk that the Ninth Circuit's ruling will thus prove to have been entirely gratuitous, that court's eagerness to reach and sustain appellees' federal constitutional challenge to a state statute is especially hard to countenance in a federal system such as ours. For the Land Reform Act surely "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open." *See Pullman*, 312 U.S. at 498. Whenever reviewing the validity of state takings, this Court has observed that what is a "public use" depends heavily on circumstances about which state courts have special familiarity that federal courts must treat with "very great respect." *Fallbrook Irrigation District v. Bradley*, 164 U.S. at 160-61. *See also Strickley v. Highland Boy Mining Co.*, 200 U.S. at 530; *Clark v. Nash*, 198 U.S. at 367-69. Accordingly, this Court's abstention rulings have been particularly sensitive to the unique role of eminent domain as "intimately involved with sovereign prerogative." *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. at 28.

Moreover, this case, like *Thibodaux*, "present[s] difficult questions of state law bearing on policy problems of substantial public import . . . transcend[ing] the [substantive issues] in the case . . . at bar." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976). In *Thibodaux*, those separate state-law questions involved the relationship of municipalities to the state, under Louisiana law, in wielding the power of eminent domain. Here, those distinct state-law questions involve the relationship of courts and agencies to the legislature, under Hawaii law, in assessing the public purposes allegedly served by a taking of land. If the Supreme Court of Hawaii were to sit as a superlegislature—a choice surely within its power under the Federal Constitution—and if it were, in that capacity, to rule that the takings at issue put land to no "public use" as that concept is employed in Hawaii law despite the state legislature's and the HHA's contrary views, then a ruling on a wholly independent state law issue—that of the state's internal allocation of lawmaking

authority—would have exposed the folly of the Ninth Circuit's anticipatory intervention.

Paradoxically, however, that intervention, if sustained by this Court, would halt the very proceedings in which the Hawaii Supreme Court might render just such a ruling—for all such proceedings arise out of a state law held facially void in the judgment here being appealed.[62] Of course, had the judicial proceedings against appellees which are now *en route* to the Supreme Court of Hawaii been filed in state court *prior* to appellees' launching of this federal challenge in February 1979, the principles enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), would flatly preclude such direct federal intrusion into pending state proceedings quite apart from the dictates of *Pullman* and *Thibodaux* abstention. *See Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975) (extending *Younger* to state condemnation suits). That the judicial proceedings in state court instead began *after* those in federal court might be thought to render *Younger* technically inapplicable but cannot make its underlying philosophy irrelevant.

Moreover, even as a *technical* matter *Younger* might well directly bar the federal intrusion engineered below—since the administrative hearing at which the statutorily-required "public purposes" finding must be made by the HHA, *see* Hawaii Rev. Stat. § 516-22, in fact took place in the Kamiloiki Valley case (and others) *before* this federal action was instituted. *See* Statement of Case, *supra*, at pp. 6-7. To be sure, not *all* administrative proceedings are necessarily equivalent to judicial proceedings for *Younger* purposes. But appellees evidently viewed *these* proceedings as judicial in character when they submitted to the HHA the very same federal constitutional arguments against the impending condemnation that they subsequently presented to the federal district court.

Whether appellees were correct in this view of the judicial capacity of the HHA poses purely a question of Hawaii law on

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62 Indeed, appellees seek at this very moment to have the Ninth Circuit *enjoin* all such state proceedings in order to enforce its declaration of the Act's federal invalidity. *See* Emergency Motion to Recall or Clarify Mandate in No. 80-4368, filed by appellants in the Ninth Circuit on July 19, 1983.

which Hawaii's courts have yet to speak. At the very least, therefore, for the Ninth Circuit itself to rule—without the benefit of state judicial guidance—that "the public hearings before the [HHA] bear none of the attributes of a judicial proceeding," 702 F.2d at 802 n.5 (Poole, J., concurring) (A29); *id.* at 790 n.1 (opinion of Alarcon, J.) (A4), only compounded the violation of *Pullman* and *Thibodaux* and constituted an independent violation of *Burford v. Sun Oil Co.*, 319 U.S. 315, 325-32 (1943), in which this Court counseled against federal judicial guesswork about such peculiarly complex and specialized local matters as the relation of a state's judicial to its administrative processes in allocating scarce natural resources. Unlike a case in which a state administrative body is structurally "incompetent . . . to adjudicate the issues," including the federal constitutional objections, "pending before it," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), here it simply cannot be said by a *federal* court that "the predicate for a *Younger v. Harris* dismissal was lacking." *Id.*

Thus the Ninth Circuit's rush to federal judgment not only flouted settled principles of abstention but might also, as a partial corollary, have breached *Younger*'s requirement of "outright dismissal," *Gibson*, 411 U.S. at 477. That the proper application of *Younger* may be clouded by state-law uncertainties simply underscores the circuit court's error in taking Hawaii's procedural law into its own hands for purposes of holding Hawaii's substantive law violative of Fourteenth Amendment due process.

CONCLUSION

The Ninth Circuit's invalidation of vital state legislation thus represented an impermissible assault on all three branches of state government. Had the federal challenge to the Land Reform Act been as serious as the circuit court deemed it, the only course consistent with our federal system would have been abstention or dismissal. Instead, having erroneously bypassed the state executive and judicial branches, the court below shattered all twentieth-century precedent by substituting its notions of Hawaii's land-use needs for those of the state legislature. No branch of any state's government may rest secure while so roving a commission is at large. To correct such federal judicial excess, this Court should note jurisdiction and ultimately reverse the judgment below.

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No. 83-____

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Argued and Submitted Oct. 21, 1981

Decided March 28, 1983

No. 80-4368

Frank E. MIDKIFF, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs-Appellants,

—v.—

Paul A. TOM, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority,

Defendants-Appellees,

—and—

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion

Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation,

Intervenors-Appellees.

Appeal from the United States District Court for the District of Hawaii.

Before:

ALARCON, POOLE and FERGUSON,
Circuit Judges.

ALARCON, *Circuit Judge:*

The question presented by this case is whether a state may take real property from a lessor and transfer title in fee simple absolute to a lessee because of a shortage of land for fee simple residential ownership.[1] We hold that such a taking violates the federal constitution.

---

1 Federal district court jurisdiction of the case sub judice is based upon 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights) & 2201 (declaratory relief) and 42 U.S.C. § 1983 (civil action for deprivation of rights). The issue of whether the district court should abstain from the exercise of its jurisdiction was raised during the proceedings below. The district court proceeded to the merits and thus implicitly exercised its discretion to decline abstention. *See Midkiff v. Tom*, 483 F.Supp. 62 (D.Haw. 1979).

The general rule is that a federal court must decide the cases properly before it; abstention from the exercise of jurisdiction is the exception to the

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On February 19, 1979, the Trustees of the Kamehameha Schools/Bishop Estate [Bishop Estate] filed a declaratory relief

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rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1385 (9th Cir. 1981). "[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n. 5, 98 S.Ct. 673, 677-678 n. 5, 54 L.Ed.2d 618 (1978). This court will reverse the district court on the issue of abstention only where there has been an abuse of discretion. *Shamrock Dev. Co.*, 656 F.2d at 1385.

There are several bases upon which a federal court may abstain from exercising its jurisdiction. *See International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n*, 614 F.2d 206, 211-12 (9th Cir. 1980) [*International Bhd*]. A federal court may decide to abstain, for example, where a federal constitutional issue could be "mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959) (citing inter alia *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). This court has held that abstention based upon this doctrine (*Pullman* abstention) is required if three tests are met:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
>
> (3) The possibility determinative issue of state law is doubtful.

Canton v. Spokane School Dist. # 81, 498 F.2d 840, 845 (9th Cir. 1974) (citing *Pullman*, 312 U.S. at 498-99, 61 S.Ct. at 644-645) (footnote omitted). A state's system of eminent domain "is intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (upholding district court's exercise of discretion resulting in abstention), however, this alone is insufficient to require abstention. *Frank Mashuda Co.*, 360 U.S. at 191-92, 79 S.Ct. at 1064-1065; *see Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5 (1978); *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980). It is especially crucial that there be "an uncertain issue of state law." *Id.* at 78. The Hawaii Land Reform Act is perfectly clear as to the key issue of whether the condemnation system set forth in Hawaii Rev.Stat. ch. 516 is for a public use. The statute unambiguously states: "The use of the power to eminent domain [under the Hawaii Land Reform Act]

action alleging that the Hawaii Land Reform Act, Hawaii Rev.Stat. ch. 516, was unconstitutional. The Commissioners and the Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority were named as defendants

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. . . is for a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Moreover, there is no fair construction of this provision that would moot the federal issue of whether the condemnation is for a public use. "Hence, the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional." *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Abstention by the district court thus would have been inappropriate.

Federal courts may also decline to exercise their jurisdiction where the dispute involves "an essentially local issue arising out of a complicated state regulatory scheme . . . ." *International Bhd.*, 614 F.2d at 211. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Ninth Circuit has limited abstention under this principle (*Burford* abstention) to cases where: (1) the state has concentrated suits involving the local issue in a particular court; and (2) the federal issues are not easily separable from state law issues with which the state courts may have special competence. *See International Bhd.*, 614 F.2d at 211. Hawaii has not concentrated challenges to its condemnation system in any court. The federal issue of whether the takings provided for by the state legislature is for a public use is easily separable from any state law issues especially since the statute is clear. *Burford* abstention is thus inapplicable.

Finally, abstention by a federal district court is appropriate under the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* and its progeny counsel federal court abstention when there is a pending or ongoing state proceeding, *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979); *L.H. v. Jamieson*, 643 F.2d 1351, 1352 (9th Cir. 1981), in which the federal claims could be competently adjudicated. *See Moore*, 442 U.S. at 425, 99 S.Ct. at 2378. The Supreme Court recently reiterated that abstention under *Younger* principle is limited to federal cases which "seek to enjoin state judicial proceedings. . . ." *Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 185, 70 L.Ed.2d 271 (1981). *See Zablocki*, 434 U.S. at 379-80 n. 5, 98 S.Ct. at 677-678 n. 5. Plaintiffs in this action have not sought to enjoin any state judicial proceedings. We are informed by counsel on both sides of the abstention issue that, as of the time this action was filed, no condemnation actions had been filed in the state courts. This fact is undisputed. Moreover, even though such suits may now be pending in the state courts, the "principles of comity and federalism *do not require* that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport, N.Y. v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n. 8; 97 S.Ct. 1047, 1051 n. 8, 51 L.Ed.2d 313 (1977) (emphasis added). The district court acted correctly in declining to abstain from the exercise of its jurisdiction.

[original defendants and intervenors hereinafter Appellees]. The district court declared that the challenged statute before us was constitutional. *Midkiff v. Tom*, 483 F.Supp. 62, 70 (D.Haw. 1979). This appeal followed.

The Hawaii Land Reform Act permits certain lessees in possession of land in that state to acquire title in fee simple absolute through eminent domain proceedings. This legislation was enacted after a determination by the Hawaii Legislature that land ownership is concentrated in a few persons who have chosen to lease their property rather than to sell it. The legislature found that this practice has resulted in a shortage of fee simple land and an artificial inflation of residential land values in the state.

We must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur. The protection provided by the fifth amendment has been extended to the states by reason of the fourteenth amendment. *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896).

II

As originally drafted, the Federal Constitution contained no reference to the protection of private property interests. It is quite clear, however, that prior to the founding of this nation, it was well established that the government could not take private property except for the use of the public. Hugo Grotius, one of the first commentators to define eminent domain, articulated a "public advantage" as a necessary prerequisite to a taking by the state. 2 H. Grotius, De Jure Belli Ac Pacis 385 (F. Kelly trans. London 1925) (1st ed. Amsterdam 1646). In 1758, E. de Vattel wrote that the exercise of the power of eminent domain had to be for the "public welfare." E. de

Vattel, The Law of Nations, 96 (C. Fenwick trans. 1916) (1st ed. 1758). S. Pufendorf stated that a government taking must be for the "necessities of the state." De Jure Naturae et Gentium 1285 (C. & W. Oldfather trans. London 1934) (1st ed. 1688).

III

The failure to spell out a precise guarantee for the protection of life, liberty, and property interests in the body of the United States Constitution was deliberate. James Madison, considered by historians to be the Father of the Constitution,[2] explained the reasons for this conscious omission as follows:

> My own opinion has always been in favor of a bill of rights . . . . At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. . . . I have not viewed it in an important light—1. because . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. . . .

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 The Writings of James Madison 271-72 (G. Hunt ed. 1904).

Madison was, however, keenly mindful of the need to create a form of government which would protect each person's

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2 United States Constitutional Sequicentennial Comm'n, History of the Formation of the Union Under the Constitution 122 (1941).

property interests. He stated this concern eloquently at the constitutional convention. "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands]. . . ." 2 The Records of the Federal Convention of 1787 203-04 (M. Farrand ed. 1911) (footnotes omitted).[3]

In 1787 Madison expressed his views to Thomas Jefferson concerning the need to protect minority rights from the acts of a majority that might seek to remedy unequal property distribution through legislative action:

> [N]o society ever did or can consist of [a] . . . homogeneous . . . mass of Citizens. . . . In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. . . . [These distinctions will produce dissention and faction.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority.

Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), *reprinted in* 5 The Writings of James Madison 29.

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3 Madison also articulated this concept earlier during the constitutional convention: "The lesson we are to draw . . . is that where majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure." 1 The Records of the Federal Convention of 1787, 136 (M. Farrand ed. 1911).

Madison's distrust of government according to the will of a majority of the electorate was based on first hand observation:

> In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure. . . . Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In the Federalist papers Madison argued forcefully that a republican form of government was essential to preserve minority rights.

> Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .
>
> . . . [Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.
>
> • • • • •
>
> . . . [T]he most common and durable source of factions, has been the various and unequal distribution of

> property. Those who hold, and those who are without property, have ever formed distinct interests in society. . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation . . . .
>
> • • • • •
>
> . . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .
>
> • • • • •
>
> . . . [In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . .
>
> A republic . . . promises the cure for which we are seeking. . . .

The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).

Alexander Hamilton expressed similar apprehensions for the rights of property owners in his contributions to the Federalist. He wrote: " '[A]dditional security to republican government, to liberty, and to property,' " is to be derived from the adoption of the Constitution. *Id.* No. 85, at 639 (A. Hamilton); and, "[A strong executive is essential] to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice . . . ." *Id.* No. 70, at 522 (A. Hamilton).

Initially, Madison did not publicly support a bill of rights. Prior to the ratification of the Constitution he "opposed all previous alterations as calculated to throw the states into dangerous contentions, and to furnish secret enemies of the

Union with an opportunity of promoting its dissolution." Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 5 Writings of James Madison 319-21 n. 1. Once the Constitution had been ratified by eleven states and "a very great majority of the people of America," he felt that "[c]ircumstances are now changed." *Id.* Madison reversed his position and supported the amendments as "providing additional guards in favor of liberty." *Id.* On June 8, 1789, Madison presented a draft of twelve proposed amendments to the first session of Congress. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972). Included was the following eminent domain clause: "No person shall be . . . obliged to relinguish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoebuck, *A General Theory of Eminent Domain*, 47 Wash.L.Rev. 553, 595 (1972).

If we look to the language of the Federal Constitution, and interpret the protection afforded property interests contained therein according to the intent of those who drafted it, it becomes unmistakably clear that the Hawaii Land Reform Act is unconstitutional. As anticipated by Madison, the Hawaii Legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land. The Federal Constitution and the fifth and fourteenth amendments were adopted with the express purpose of invalidating the taking of the private property from one person for the private and exclusive enjoyment by another.

IV

We are told by Appellees that court interpretations of the Federal Constitution support the validity of the Hawaii Land Reform Act. Our analysis of the cited cases follows. Although the scope of the power of eminent domain has been only vaguely and inconsistently stated, *see* Berger, *The Public Use Requirement in Eminent Domain*, 57 Or.L.Rev. 203, 204-05

(1978), there is one instance where there is general agreement that eminent domain must not be used. The sovereign may not take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit. *Missouri Pacific Railway Co.*, 164 U.S. at 417, 17 S.Ct. at 135; B. Schwartz, *A Commentary on the Constitution of the United States, The Rights of Property* (pt. 2) 241 (1965); *see also, Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798) (Chase, J., seriatum opinion) ("[A] law that takes property from A. and gives it to B. . . . is against all reason and justice . . . ."). None of the authorities cited by appellees has declared such an attempt constitutional.

V

The cases upholding takings for a public use teach us that we must look at each case on an ad hoc basis: "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." *Fallbrook Irrigation District*, 164 U.S. at 159-60, 17 S.Ct. at 63. There are several recurring facts and circumstances, however, that are present in the cases in which appellate courts have found a proper exercise of the power of eminent domain.

Courts have found that a taking has been for a public use where:

A. The taking will result in condemnation of property for an historically accepted public use.

B. The taking will result in a change in the use of the land.

C. The taking will result in a change in possession of the land.

D. The taking will result in a transfer of ownership from a private party to a governmental entity.

E. The taking will result in a de minimis condemnation necessary to facilitate the development of nearby land. None of these facts nor circumstances are present in the Hawaii Land Reform Act.

A

Following the establishment of the United States Constitution, there were two major kinds of activities for which the power of eminent domain was undisputedly properly employed: mill acts and road building. *See Berger, supra* at 205. General mill acts allowed any owner of land upon a nonnavigable stream to build and maintain mills for manufacturing purposes. *See Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 20-21, 5 S.Ct. 441, 445-446, 28 L.Ed. 889 (1885). In *Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140, 26 S.Ct. 353, 50 L.Ed. 696 (1906), the plaintiff challenged a general mill act enacted by Massachusetts. The Supreme Court summarily disposed of any general objection to the act on the basis that it constituted a taking for private use violative of the fourteenth amendment and noted that: "Such acts have been in force in Massachusetts ever since an act of 1714. . . . The practice sanctioned by them would seem from the recitals of that act to have been still older." *Id.* at 151, 26 S.Ct. at 354.

The Supreme Court similarly recognized a long-standing tradition of the use of eminent domain for the purpose of building roads in *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923). In *Rindge*, plaintiffs objected to the taking of its property for two proposed highways that were to be built entirely on its private property. Only one of the roads, the "main road," was to be connected to a public highway and only at one end; the other road, was to branch off the main road. *Id.* at 703, 43 S.Ct. at 691. The Court upheld the condemnation as being for a public use: "That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial." *Id.* at 706, 43 S.Ct. at 692.

This court found condemnation of private land for road building was a public use in *Guam v. Moylan*, 407 F.2d 567, 567-68 (9th Cir. 1969). The rationale, however, was based upon an analogy to redevelopment cases. *See id.* at 568.

Where the purpose of a taking has been historically deemed to be for the public it will be upheld by the courts.

B

The taking of private property has been upheld where there is a change in the use of the land. Often the change in the use is obvious and direct. Examples include the condemnation of land to build roads where no previous roads exist as in *Rindge*, 262 U.S. at 702-03, 43 S.Ct. at 691 or to build a railroad spur where no previous track exists. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 600-01, 28 S.Ct. 331, 332-333, 52 L.Ed. 637 (1908). Similarly upheld are condemnations for the purpose of developing a power plant, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 236, 60 L.Ed. 507 (1916) or developing a recreational area, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 550, 66 S.Ct. 715, 717, 90 L.Ed. 843 (1946) (condemnation by TVA of private property for transfer to the National Park Service as part of the Great Smokey Mountains National Park); *United States v. 416.81 Acres of Land*, 514 F.2d 627, 629 (7th Cir., 1975) (undeveloped lands condemned for the Indiana Dunes National Lakeshore). Changes in the use of condemned property also may be upheld where the change is of a less direct nature. One such example involves the redevelopment of a community. *E.g., Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (discussed *infra*, § VI(A)).

Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) is an example of a case that involves both changes of a direct and indirect nature. The major agricultural holdings of a landowner were to be condemned for, inter alia, three purposes which would result in a change in the use of the property: "(1) in small parcels to individual agregados [squatters] for the erection of their dwellings, (2) in somewhat larger parcels to individual farmers for subsistence farms and (3) in large parcels by lease to expert farmers, agronomists, or other qualified persons . . . for the operation of 'proportional-profit' farms . . . ." *Id.* at 319. Thus agricultural land was to be taken in some instances for building residences and in other instances for smaller farms, either upon which an individual

could subsist or upon which experts would operate proportional profit farms.

In each of the foregoing cases land was condemned for the purpose of putting it to a different use.

C

Another factual circumstance common to many constitutional takings is that the party who will possess the land after condemnation is not the same party who possesses it prior to the condemnation. The majority of the cases discussed above include examples of such a transfer of possession. One example of an instance where the possessor was the same before and after condemnation can be found in two cases where the government condemned a reversionary interest it held in leased land. *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925) (federal government can properly condemn reversionary interest in land it was leasing for possible military purpose); *United States v. Certain Parcels of Land*, 141 F.Supp. 300, 307 (D.Wyo. 1956) (condemnation of reversionary interest in land leased by government upon which government housing had been built is for a public use), *aff'd sub nom. Arp v. United States*, 244 F.2d 571 (10th Cir.), *cert. denied*, 355 U.S. 826, 78 S.Ct. 34, 2 L.Ed.2d 40 (1957). It is important to note, however, that in both of these cases, the government, not a private party, was the beneficiary of the condemnation.

D

Where the beneficiary of the condemnation is a governmental entity there is a strong indication that the taking is for a public use:

> [W]here the land is taken by the government itself, there is not much ground to fear any abuse of the [eminent domain] power. . . . [When the power is delegated to a private corporation] the presumption that the intended use for which the corporation proposes to take the land is

> public [when declared to be so by the legislature], is not so strong as where the government intends to use the land itself.

United States v. Gettysburg Electric Railway, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896). In two cases where the government was the beneficiary of condemned property, the government was a lessor seeking condemnation of the fee simple interest. In *Old Dominion Land Company* the government leased land for military purposes. 269 U.S. at 63, 46 S.Ct. at 39. When the lessor refused to renew the leases, the government initiated condemnation proceedings after an offer to purchase the land was refused. *Id.* The Court upheld the taking as a public use. *Id.* at 66, 46 S.Ct. at 40. Similarly, in *Certain Parcels of Land*, the government leased land upon which it built and maintained a housing project. 141 F.Supp. at 303. The owners of the land refused to renew the lease and the government sought to condemn the fee simple title. *Id.* The court found acquisition of the fee did not violate the public use limitation in violation of the owners' constitutional rights. *Id.* at 307.

Eastern Sugar Associates, 156 F.2d at 319, also involved a situation where the government could have remained in possession of the condemned land after condemnation. One of the acts that was challenged permitted the government to purchase lands and establish an organization to plant sugar cane for development of the sugar and liquor industries. *Id.* This was upheld as a taking for a public use. *See id.* at 324.

E

Finally, courts have upheld the condemnation of land where the taking is de minimis and for the purpose of facilitating the development of nearby land.

In *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), a mining company sought to condemn land for a right of way. The purpose was to erect an aerial bucket line that would result in the placement of four movable towers on the condemnees' land. *Id.* at 529-30,

26 S.Ct. at 302. The line would transport ore from the mines to the railway station two miles away. *Id.* at 529, 26 S.Ct. at 3021. *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), involved an attempt to condemn a portion of a neighbor's land by enlarging a ditch to irrigate the condemnor's arid land to produce crops. *Id.* at 362, 25 S.Ct. at 676. The public use was upheld in both of these cases. In each case, the extent of the taking was minimal. The towers in *Strickley* were not permanent and the condemnor was under an obligation "to move the towers as often as reasonably required by the owners" in order for them to mine their land. 200 U.S. at 530, 26 S.Ct. at 302. *Clark* involved taking only enough land to widen by twelve inches the existing irrigation ditch which measured eighteen inches wide, twelve inches deep. 198 U.S. at 363, 25 S.Ct. at 676-677. Thus, both condemnations involved a minimal taking of land that resulted in an increased productivity of nearby land.

VI

A

The thrust of the Appellees contentions concerning the public use issue is that this court's inquiry must be restricted to whether the legislature, in enacting the Hawaii Land Reform Act, was acting within the parameters of its police powers. For example, Appellee Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund assert the following:

> *Berman* [348 U.S. at 26, 75 S.Ct. at 98] could not be clearer. If the legislative object is within its authority, the use of eminent domain is permissible, since that power serves simply as a means to the end. It follows that if it is constitutional to pursue an objective by police power regulations, eminent domain may be used.

Brief for Appellees Kahala Community Association, Inc. & Kahala Community Association Fee Purchase Fund at 23.

We disagree. *Berman* does not paint with so broad a brush. *Berman* involved the condemnation of buildings in a slum area for the purpose of building a new community. Congress had made a determination that the slum area was harmful to the health, safety, morals, and welfare of the public. *Id.* at 28, 75 S.Ct. at 100. It declared that condemnations for redevelopment pursuant to the redevelopment plan were for a public use. *Id.* at 29, 75 S.Ct. at 100-101. Buildings that were old, decayed, and unsafe were to be razed and replaced by new buildings. New homes, schools, churches, parks, streets and shopping centers were to be built. *See id.* at 34-35, 75 S.Ct. at 103-104. The court focused on the planned condemnations on an area basis rather than on a structure-by-structure basis. *Id.* at 34, 75 S.Ct. at 103. Thus, it was not important whether a single building represented a safety or health hazard or was unsightly. The important fact was "to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns." *Id.* This transformation from slum to healthy thriving community represents a change in the use of the land.

By contrast, the Hawaii Land Reform Act will result in no change in use of the property. The property itself is currently used for residential purposes. After condemnation it will be used for residential purposes. Appellees argue that there is a change in use in that the land is now used for investment purposes; subsequent to condemnation it will only be used for residential purposes and the owner of the newly created fee simple land will treat the property differently because he knows he can stay there as long as he chooses. These alleged changes in use, however, are simply different forms of *private* use.

The redevelopment in *Berman* authorized the transfer to public agencies of land "to be devoted to such public purposes as streets, utilities, recreational facilities, and schools." *Id.* at 30, 75 S.Ct. at 101. The remaining land was to be redeveloped

preferably by private enterprise. *Id.* Thus, it was possible that certain property owners would be permitted to repurchase their properties. *Id.* at 34, 75 S.Ct. at 103. The key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, *i.e.*, the redevelopment of the area. In the case before us there is no such intermediate step in which the government holds the property for the accomplishment of a public purpose. The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. *Berman* does not authorize such a scheme. Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings. Nothing in *Berman* would provide, as does the Hawaii Land Reform Act, the lessee of condemned property with greater rights to that property than the owner.

It is against this factual background that we must read its sweeping language: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 33, 75 S.Ct. at 103. The Supreme Court also stated in *Berman* that: "*Subject to specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32, 75 S.Ct. at 102 (emphasis added). We read this language as requiring the judiciary to scrutinize carefully any legislative attempt to take private property so as to determine if it is in violation of any constitutional provision. The fifth amendment is specific: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V; *see also*, cases cited § VI(B) *infra* (role of judiciary in determining public use). To hold, as the district court below did, that the public use limitation is subsumed under a "police power/due process analysis," *Midkiff*, 483 F.Supp. at 67, would be to ignore the explicit language of the constitution and to disregard the fifth amendment protections granted to citizens of the states under the fourteenth amend-

ment. *See, e.g., Missouri Pacific Railway*, 164 U.S. at 417, 17 S.Ct. at 135. Such a result is untenable. Indeed, the Supreme Court has held that merely because the legislature has the power to regulate private property does not allow it to take that property without just compensation in violation of the fifth amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-393, 62 L.Ed.2d 332 (1979). It follows that because the state legislature has the power to regulate private property does not allow it to take that property for a nonpublic use in violation of the fourteenth amendment.

B

Appellees, citing *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40, also argue that review by this court is limited to the question of whether the determination of the existence of public use by the Hawaiian Legislature, Hawaii Rev.Stat. § 516-83(a)(12)[4] "is shown to involve an impossibility." Appellees direct our attention to the following cases as well: *Berman*, 348 U.S. at 32, 75 S.Ct. at 102 (citing *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718; *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40); *Gettysburg Electric Railway Co.*, 160 U.S. at 680, 16 S.Ct. at 429; *Southern Pacific Land Co. v. United States*, 367 F.2d 161, 162 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1485, 18 L.Ed.2d 591 (1967). The cases cited by Appellees, however, involved the review of a *congressional* determination that there was a public use, *not* the review of a state legislative determination. In *T.V.A.*, 327 U.S. at 552, 66 S.Ct. at 718 the Supreme Court stated that review of a congressional public use declaration is not the same as the

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4 Hawaii Rev.Stat. § 516-83(a)(12) states:

> The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated *is for a public use* and purpose.

(emphasis added).

review of a state legislative determination: "But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, . . . when *Congress* has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' " (quoting *Old Dominion Land Co.*, 269 U.S. at 66, 46 S.Ct. at 40 (emphasis added)). Where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); This matter involves a review, under the fourteenth amendment, of a state legislative determination. This court must properly make the ultimate determination of whether the use is public.

Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905) cited by one of the appellees for the proposition that courts should pay deference to state legislative determinations, is particularly appropriate here. The Court is explicit: " 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain . . . . For if the use be not public . . . the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.' " *Id.* at 252, 25 S.Ct. at 256 (quoting *Tracy v. Elizabethtown, Lexington & Big Sandy Railroad*, 80 Ky. 259, 265 (1882)). Moreover, were Congress to enact a statutory provision that would allow condemnation of *A*'s private property for transfer to *B*, solely for *B*'s private use, this court would necessarily find such action contrary to the fifth amendment whether or not congress declared such proceedings to be for a public purpose. *See, e.g., Colchico v. United States*, 286 F.Supp. 507, 509 (N.D. Cal. 1968) (court to review whether federal taking for a public use); *United States v. 23.9129 Acres of Land*, 192 F.Supp. 101, 102 (N.D. Cal. 1961) ("This court need not, and will not, stand idly by and allow [federal] administrative officials to take private property arbitrarily, capriciously, in bad faith, *or for what is essentially a private purpose*." (emphasis added)).

VII

When we strip away the statutory rationalizations contained in the Hawaii Land Reform Act, we see a naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit.

The founders of this nation sought to give constitutional protection to minority rights. They wisely foresaw that attempts would be made by the states to take away the private property rights of the landed minority. Our Federal Constitution and the Bill of Rights were designed to prevent such abuses by the majority. That Constitution now compels us to find that the Hawaii Land Reform Act violates the public use limitation of the fifth and fourteenth amendments. Those provisions of the Hawaii Reform Act that provide for the condemnation of certain residential property are facially unconstitutional.

The decision of the district court is REVERSED and REMANDED for further proceedings consistent with the views expressed in this opinion.

POOLE, *Circuit Judge*, concurring.

I concur in Judge Alarcon's careful and well-researched opinion and in his conclusion that the Hawaii Land Reform Act violates the Fifth and the Fourteenth Amendments to the Constitution of the United States. I recognize that another member of this court, whose opinion is of value and entitled to thoughtful consideration, expresses a contrary view.

Nonetheless an independent review convinces me that in light of all considerations of logic, of the compelling authority of precedent, and of the Constitution itself, the Hawaii Land Reform Act is unconstitutional. It is my further opinion that the United States District Court properly undertook to decide that issue but reached a manifestly erroneous conclusion in upholding the Act.

But however firm these conclusions may appear to me, I am concerned that we not seem to have, as charged in our brother's scold, "cavalierly" ventured to decide these legal issues; asked the "wrong" questions and gotten "wrong" answers; or foresworn that "judicial modesty" which ought to have warned that we are not in position (as presumably are the Hawaiian legislature and courts) "to judge the effectiveness and constitutionality of any attempt at reform." I therefore think it useful to set forth in calmness and reason such of my own analysis as may indicate why the dissent is mistaken. For it is incorrect that we should have abstained; and it is incorrect that there was not squarely presented to a court of the United States an unavoidable constitutional issue which this court was bound to meet and which, I submit, we now have properly decided.

I. *Abstention.*

First of all, we have decided this constitutional issue because it is before us and as a court of the United States we are obligated to hear and decide those issues over which we have jurisdiction. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). It is that obligation, not pride or immodesty, that makes federal abstention "the exception, not the rule." *Id. See also Knudsen Corp. v. Nevada State Dairy Commission,* 676 F.2d 374, 376-78 (9th Cir. 1982); *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 819-21 (9th Cir.), *cert. denied,* ____ U.S. ____, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). Abstention is only appropriate, " 'in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' " *Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)). Since the decision to abstain involves the district court's discretionary exercise of its equitable powers, it is reviewed under the abuse of discretion standard. *Turf Para-*

dise, 670 F.2d at 819. It would have been an abuse of discretion had the district court abstained.

A. *Pullman* Abstension

Four general categories of abstention have been generally recognized. The first, *Pullman* abstention, is appropriate where a federal constitutional issue may be avoided or presented in a different light by resolution of an issue under state law. *Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244-1245; *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Knudsen Corp.,* 676 F.2d at 377. For example, a state court might interpret the provisions of a challenged statute so as to moot the federal constitutional issue raised. *See, e.g., Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020 (5th Cir. 1981), *cert. denied,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982). Here, however, as Judge Alarcon points out, the Hawaii Land Reform Act specifically provides that its provisions are intended to serve "a public use and purpose." Hawaii Rev.Stat. § 516-83(a)(12). Therefore, state courts of Hawaii could not interpret the statute to avoid the "public use" issue and hence federal review is not thereby spared.

Pullman abstention may also be appropriate where a state court may find that the challenged statute violates the state's own constitution. But such abstention is limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution. *See Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838, 840-41 n. 3 (9th Cir. 1979); *Pue v. Sillas,* 632 F.2d 74, 80-81 (9th Cir. 1980); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 at 462-63 (1978). The Hawaii Constitutional Provision concerning eminent domain imposes the same "public use" standard as required under the Fifth and Fourteenth Amendment due process clauses of the United States Constitution. *See* Hawaii Const. art. I, § 20[1]; *Missouri Pacific*

1 Section 20 provides:

> Private property shall not be taken or damaged for public use without just compensation.

Railway v. Nebraska, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). Therefore *Pullman* abstention to permit application of this "mirror image" state constitutional provision would not be appropriate.[2] *See, e.g., Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero,* 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976) (abstention not appropriate under state constitutional provision similar to federal constitution equal protection clause); *Pue v. Sillas,* 632 F.2d at 81.

B. *Burford* Abstention

Abstention may also be appropriate under the standards originally set out in *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." *International Brotherhood of Electrical Workers, Local Union No. 1245 v. Public Service Commission,* 614 F.2d 206, 212 n. 1 (9th Cir. 1980). In considering *Burford* abstention this court has examined whether the state channels into a single court lawsuits challenging the state agency's actions, whether the federal issues are inextricably linked to the state law issues, and whether federal adjudication would interfere with the state's efforts to maintain a consistent policy. *See Knudsen Corp.,* 676 F.2d at 377; *International Brotherhood of Electrical Workers,* 614 F.2d at 211.

Hawaii has not created specialized courts to hear cases arising under the Act and the federal due process issue is not linked to complex state law issues. Moreover, we have recently specifically refused to apply *Burford* abstention to cases involving zoning and land use questions, even though, as appellees suggest, issues regarding land use and regulation are

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2 The dissent implies, but does not endeavor to support, the view that somehow the courts of Hawaii might chance upon a construction of the Land Reform Act under circumstances not relying upon familiar concepts of "public use." Since this is only sheer speculation, it need not detain our thoughts.

special local concerns. *See International Brotherhood,* 614 F.2d at 211; *Isthmus Landowners Association v. California,* 601 F.2d 1067 (9th Cir. 1979) (challenge to coastal zoning regulations); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976) (zoning challenge); *Santa Fe Land Improvement Company v. City of Chula Vista,* 596 F.2d 838 (9th Cir. 1979). Thus, *Burford* abstention is not appropriate in this case.[3]

C. Prudential Abstention—*Colorado River*

The third ground for abstention, recognized in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), stems from princi-

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3 The principal case upon which appellees rely, *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), is generally classified as within *Burford* abstention. *See Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244-1245. In *Thibodaux* the Court upheld a lower court decision to abstain in an eminent domain action removed to federal court, referring to the "special nature" of eminent domain as "intimately involved with sovereign prerogative." 360 U.S. at 28, 79 S.Ct. at 1073.

Yet *Thibodaux* should not be read as an endorsement of abstention in all proceedings involving eminent domain. On the day it decided *Thibodaux,* the Court held that abstention was not appropriate in another eminent domain case, *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). The Court specifically stated that merely because "a case concerns a state's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty." 360 U.S. at 191-92, 79 S.Ct. at 1064.

Although the two opinions are not easily reconciled, *see* C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4241 at 441 (1978), the Supreme Court has subsequently indicated that the principal significance of *Thibodaux* is its holding that a district court may find it necessary to abstain where the case involves "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River,* 424 U.S. at 814, 96 S.Ct. at 1244. In particular, the state law issue in *Thibodaux* was whether a city could exercise the power of eminent domain under Louisiana law—an issue, as *Colorado River* suggests, which transcended the importance of the case itself. Here there is no such independent state law issue.

ples of " 'wise judicial adminstration.' " 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). A district court may abstain where "exceptional circumstances * * * indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979). However, given the "unflagging obligation" of the federal courts to exercise their jurisdiction, the applicability of this doctrine is even more limited than the circumstances normally justifying abstention. *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-1247. Thus in *Colorado River* the Court found that "exceptional circumstances" existed to dismiss the federal action in favor of a pending state action because of the Congressional policy set out in the McCarren Amendment to avoid piecemeal adjudication of water rights—a policy reflected in traditional rules governing the adjudication of property matters, and also because state law had established a single continuous proceeding for the adjudication of Colorado river water disputes. No comparable factors here favor adjudication in state court, and therefore the heavy burden necessary to justify abstention has not been met.

D. *Younger* Abstention

A fourth area for abstention is based on the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* held abstention appropriate where the federal claimant sought to restrain ongoing state criminal judicial proceedings. The principle has subsequently been extended beyond the criminal context to state proceedings which involve "important state interests." *Middlesex County Ethics Committee v. Garden State Bar Association*, ___ U.S. ___, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Thus, the Supreme Court has specifically approved abstention to avoid interference with civil contempt proceedings initiated by a state court, *Juidice v.*

Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); attachment proceedings brought by a state to recover welfare payments procured by fraud, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); a custody proceeding in which the state sought to recover custody of abused children, *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); and state disciplinary proceedings for members of the bar, *Middlesex*, 102 S.Ct. at 2523 ("The importance of the state interest in the pending state jurisdiction proceeding * * * calls *Younger* abstention into play"); and *id.* at 2524 ("No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles"). Since the federal claimant could raise the constitutional claims in the state proceedings, the interests of comity and federalism precluded federal interference in the state proceedings. *See* Hart & Wechsler, *The Federal Courts and the Federal System* 280-82 (Supp. 1981).

Although the Supreme Court has not addressed the issue, in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975), the Seventh Circuit has held that a state's interest in eminent domain proceedings constitutes so important a governmental interest that *Younger* abstention is appropriate. That court reasoned that since the federal constitutional claims could be raised in the ongoing state court proceedings it was appropriate for the federal court to abstain "so as not to interfere with state sovereignty." 528 F.2d at 200.

Ahrensfeld, however, relied only in part on *Younger*'s abstention doctrine. The court also found that "other circumstances" were present which made *Pullman* abstention appropriate because of an unresolved issue regarding state valuation standards.[4] 528 F.2d at 199-200. But as indicated

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4 The project involved was the taking for the construction of an Athletic and Convention Center. The federal plaintiffs challenged public purpose and also that such a taking was improper under the applicable Illinois Eminent Domain Act. The court said: "Since 'the state court's interpretation of the [statute] may obviate any need to consider [its] validity

above, *Pullman* abstention is not appropriate here. Also, as already said, this circuit has concluded that a state's interest in land use and regulation does not automatically justify abstention under the *Burford* doctrine, which, like *Younger*, contemplates deference where there is an ongoing state judicial proceeding. *See Middlesex County Ethics Committee, supra; Zablocki v. Redhail,* 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978). Such ongoing action must begin "before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975); *Middlesex,* 102 S.Ct. at 2524. Unless such an action is underway the interests expressed in *Younger* of avoiding duplicative litigation and interference with the state judicial system are not applicable. And proceeding in the federal action in such circumstances is not to be regarded as reflecting a lack of confidence in the state court's adjudication of constitutional issues because "the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Steffel v. Thompson,* 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974).

Appellants in this case filed their district court complaint in February, 1979. At that time the only extant proceedings at the state level were public hearings being conducted by the Hawaii Housing Authority as required under the Hawaii Land Reform Act before instituting condemnation of certain of appellant's residential tracts. *See* Hawaii Rev. Stat. § 516-22.[5]

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under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.' " 528 F.2d at 200 (citing *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 641, 79 S.Ct. 455, 457, 3 L.Ed.2d 562 (1959), and *Martin v. Creasy,* 360 U.S. 219, 224, 79 S.Ct. 1034, 1037, 3 L.Ed.2d 1186 (1959). (Citations omitted.)

5 Section 516-22 provides:

Designation of leased fee interest in all or part of development tract for acquisition. The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise

The dissent refers to four state court condemnation suits which at various times were pending in the state court. All were settled without trial. Three were terminated before the district court ruled on the summary judgment motions before it. The fourth remained pending after the final judgment was entered here, but it too was settled. The dissent misreads the law in its premise that the mere filing of a condemnation action would *proprio vigore* bring into play the requirement of abstention. As Justice Brennan stated in *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216 n. 10, 39 L.Ed.2d 505 (1974):

> of the power of eminent domain or by purchase under the threat of eminent domain after twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, * * * the authority finds that the acquisition of the leased fee interest in residential houselots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in this part will effectuate the public purposes of this chapter.

Younger abstention was, as contended by the dissent, not triggered by the Housing Authority hearings provided by the statute since the Supreme Court has indicated that abstention is limited to judicial and not administrative proceedings. *See Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 112-13, 102 S.Ct. 177, 184, 70 L.Ed.2d 271 (1981). *Cf. Patsy v. Board of Regents*, ___ U.S. ___, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (exhaustion of state administrative remedies not required under section 1983).

In *Middlesex*, 102 S.Ct. at 2522, the Court concluded that the district court properly abstained to prevent interference with disciplinary proceedings of a local District Ethics Committee appointed by the New Jersey Supreme Court. However, there the Court specifically found that under New Jersey law the proceedings were "judicial in nature." In particular, the Court noted that the local committees are considered the arm of the New Jersey Supreme Court and that filing a complaint with the committee "is in effect a filing with the Supreme Court."

In the present case, the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*.

> "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. [Citations omitted.]

In May, 1979, the district court heard appellants' motion for a preliminary injunction. It found that on the merits appellants were unlikely to prevail on their general due process challenge, but that the statute's mandatory arbitration and valuation provisions were facially unconstitutional. Accordingly, the court held that the state administrative condemnation proceedings could proceed but it enjoined the operation of the objectionable arbitration and valuation provisions.[6] The Hawaii Housing Authority did not actually file the first of its eminent domain lawsuits in state court against appellants until September, 1979, shortly after the parties in district court had begun filing motions for summary judgment.

Thus by the time the state proceedings were instituted in this case the federal action was well beyond "the embryonic stage." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). Under those circumstances abstention was not appropriate. *See id.* (*Younger* abstention not applicable where district court issued preliminary injunction prior to institution of state criminal action); *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978) (hearing for injunctive relief on plaintiff's likelihood of success qualifies as proceedings of substance on the merits).

Moreover, it appears that the state attorney general never raised the *Younger* issue at any time before the district court.[7] Although the parties may not waive the applicability of *Pullman* abstention, *see e.g., Santa Fe Land Improvement Co.*, 596 F.2d at 840, the Supreme Court has specifically indicated that the *Younger* doctrine need not be considered if not invoked by the state:

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6 Following the district court's ruling, the Hawaii Legislature amended Section 516 to remove the mandatory arbitration provision and to amend the valuation provisions.

7 In fact, no party addressed the abstention issue until the court raised the subject at oral argument.

> If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480, 97 S.Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). Accordingly, in submitting the issue of the statute's constitutionality to the district court in this case, it appears that the Hawaii attorney general effectively waived his claim for *Younger* abstention. *See Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 5 (5th Cir.1978), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Evansville Book Mart, Inc. v. City of Indianapolis*, 477 F.Supp. 128, 130 (S.D.Ind. 1979); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4252, at 547-48 (1978). We need not, however, rely solely on waiver, for independently it is clear that *Younger* does not apply.

In sum, none of the circumstances recognized by the federal courts as calling for abstention are present here. Therefore the district court did not abuse its discretion in proceeding to decide the constitutional issue before it.

II. Public Use

The Hawaii Land Reform Act, Part II, authorizes eminent domain proceedings for the purpose of transferring from the fee owners to existing lessees the fee simple title to single family residential lots held under long term ground leases. Haw.Rev. Stat. §§ 516-21 through 45. The act applies to residential lots of not more than 2 acres located in development tracts of not less than 5 acres and held under leases for terms of twenty years or more. Haw.Rev. Stat. § 516-1(2), (5), (11).

Condemnation proceedings are actually initiated on petition of lessees desiring to obtain the fee title to their leased property. The statute requires that the application be on behalf of the lessees of 25 lots or 50% of the lots in a development, whichever is less. Haw.Rev.Stat. § 516-22.

While the statute permits the state to appropriate funds and issue bonds for the purpose of implementing the statute, it appears that (except for administrative overhead) the state uses no public monies to acquire property under the statute. The condemnation award and incidental costs of condemnation are paid by the private lessee acquiring a given property. Haw.Rev.Stat. §§ 516-30, -33, -33.5.

Under the statute, the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase. Haw.Rev.Stat. § 516-22. While the Housing Authority is required to find that the acquisition "will effectuate the public purposes" of the statute, it need not find existence of a shortage of fee simple property in the county in which a condemned lot is located. *Compare* 167 Haw.Sess.Laws, Act 307 § 11 *and* Haw.Sess.Laws, Act 184 § 2(6) *with* 1976 Haw.Sess.Laws, Act 242 § 2 *and* Haw.Rev.Stat. § 516-22.

In addition to the condemnation provisions, the Hawaii statute also provides new safeguards to lessees of residential properties who continue under long term leases. Haw.Rev.Stat., Part III. Rights of Lessees, §§ 516-61 through 70. Among these are rent control and guarantees that such lessees may sell or assign their leasehold interests, and may cure default, this presumably easing the structures of the landlord-tenant rigid relationships.

But no restrictions are placed by the Act on the use or alienation by a lessee-turned-feeholder of his property interest. If the new owner elects to let out to a new tenant under a long-term lease, that tenant does not receive protections of Part III. The new feeholder may therefore turn around and sell that property subject to a long-term ground lease in which *he* now holds a reversionary interest, thereby continuing the very cycle and effectively frustrating the avowed purpose of increasing the incidence of fee simple residential properties in Hawaii. Because the property is no longer part of a minimum five-acre tract, the lessee-turned-lessor's property is not subject to disfeasance by operation of the eminent domain scheme under which the former tenant, now a landlord of a long-term lease,

acquired the interest. *See* Haw.Rev.Stat. § 516-1(5). Alternatively, of course, the new feeowner may elect to retain and live on his land as before, or may sell or lease a partial or entire interest therein, just as prior to the taking he and his former landlord had such options according to their respective holdings.

Thus the statute permits, but neither requires nor contemplates, a change in the use of the land. It merely provides a procedure for the involuntary transfer of title in the affected property from the disfavored lessor to the now advantaged lessee. Appellants argue that a condemnation scheme which results in change neither in use nor in possession, and whose sole effect is to transfer title from A (the lessor) to B (the lessee) does not constitute a taking for a public purpose, and so violates the fourteenth amendment. Judge Alarcon agrees, and I concur.

> The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

Missouri Pacific Railway v. Nebraska, 164 U.S. 403, 417, 17 S.Ct. 130, 135, 41 L.Ed. 489 (1896). "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 376, 81 L.Ed. 510 (1937) (citing *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 605, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 705, 43 S.Ct. 689, 692, 67 L.Ed. 1186 (1923); *Cincinnati v. Vester*, 281 U.S. 439, 446, 449, 50 S.Ct. 360, 362, 363, 74 L.Ed. 950 (1930). In my view, the Hawaii statute accomplishes precisely this invalid result, for if it does not constitute a transfer "for the private use of another," that term can have no meaning.

The legislature has set forth a number of findings in its attempt to clothe with the trappings of "public use" what is no

more than a transfer for the private use of another. *See e.g.*, Haw.Rev.Stat. § 516-83. Determining what constitutes a public use for fourteenth amendment due process examination of eminent domain proceedings, however, is a justiciable question ultimately to be determined by the court, and not the legislature. Thus, while a legislative determination of public use is entitled to considerable deference, it is not binding on this court. *Hairston v. Danville & Western Railway*, 208 U.S. 598, 606, 28 S.Ct. 331, 334, 52 L.Ed. 637 (1908); *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-718, 90 L.Ed. 843 (1946); *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362, 74 L.Ed. 950 (1930); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 7.4 (1981).

It is true that "public use" is not synonymous with "use by the public," and that a state may condemn property to be sold or leased to individuals as Judge Alarcon has explained, citing *inter alia, Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369 (1896); *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied* 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946). But the private benefit must be an incidental one, and not the dominant purpose of the taking. *Adams v. Housing Authority*, 60 So.2d 663 (Fla. 1952); *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla. 1975).

> [E]minent domain cannot be employed to take private property for a predominately *private* use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private

> property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

Id. at 455 (footnotes omitted).

In determining public use, the court may consider extrinsic facts and examine the statute as a whole to "discover the dominant purpose of the taking." 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.4[1]. "In short, the constitutional protection against the taking of public property for private use cannot be evaded by any colorable declarations that the use is public however formally and officially made." *Id.*

Upon examination of the statute and the evidence of record, I conclude that the Hawaii Land Reform Act's eminent domain provision cannot be saved as an exercise of police power. It is beyond doubt that legislation need not be wise, nor the best means for fulfilling relevant social and economic objectives. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 317, 96 S.Ct. 2562, 2568, 2569, 49 L.Ed.2d 520 (1976); *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). However, when as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists.

The Hawaii Land Reform Act proclaims its purpose to be the alleviation of the shortage of fee simple residential land in Hawaii. Yet, as set forth above (see page 13, lines 23-26), the legislature has amended the statute to delete a requirement that the Housing Authority, to whom is committed the power and decision to take, first find a shortage of fee simple housing in areas in which acquisitions under the statute are to be made.

The legislature has determined that the concentration of residential lands in the hands of a few holders who choose to

lease under long term leases has caused shortage and has resulted in an inflation of land values. In fact, the statute itself is so structured that it can only aggravate this shortage and resultant inflation of land values. The Hawaii Circuit Court has found as fact that in late years the large landholders have made residential homesites available, albeit through the traditional leasehold arrangements. *Midkiff v. Amemiya*, Civ.No. 47103 (Haw. 1st Cir.) (Findings of Fact).

But those problems with the Act, while telling of its nature, could not alone condemn it entirely. What does infect it with unconstitutionality is that it authorizes an agency of the state, upon the application of tenant, to divest his landlord of the latter's entire property and to convey it to the erstwhile tenant in fee for the sole purpose of constituting that tenant as the owner. The statute does not accomplish this transformation merely incidentally en route to the effectuation of other, different, presumably more urgent objectives; nor is it that in its unreconstituted form, the present right of freeholding threatens, interferes with, delimits, pollutes or offends against the commonweal. The divestiture is single-minded and patent of purpose: it strips the owner of the fee and vests the fee in the tenant. Otherwise, there is not an iota of change. Not a stick, stone, blade of grass, or flake of paint is altered; the use continues precisely as it was before; the awesome mechanism of taking becomes *functus officio* in the instant of its exercise; its only service is to sever ownership from A and bestow the same on B.

Indeed a unique and drastic analogue of "eminent domain" is created by this legislation; but that characterization would not alone be cause to strike it down. Indeed the purported justification is that it responds to a perceived need; but so also have many legislative enactments since December 15, 1791—the ratification date of the "Bill of Rights"—proclaimed their aim to attend outstanding needs, yet failed in passing constitutional muster. The problem which this Act cannot overcome is not its novelty or boldness or philosophical drift or internal deficiencies. The problem is in the bar of the Fifth Amendment

which reads in simple words: "[N]or shall private property be taken for public use, without just compensation."

It is not enough that a "just" price be paid when the public (the state) seeks to invade the right of lawful private ownership: the use for which the taking is made must itself be for a public purpose. It is not a public purpose to take the property of one person in order that it may become the private property of another. It is said that "outsiders" may have a problem "in comprehending the constitutionality" of this legislation. (Dissent, page 808.) A commentator, quoted *in extenso* by the dissent, *id.*, has written that one factor which a reviewing court might consider, "if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail." That writer's thesis is that elsewhere "redistribution of the land" is taken for granted, and that it would be anomalous for "this government" to insist on land reform elsewhere if "its own Constitution prevents similar reforms in the American states."

However interesting a commentary on comparative international polity, that analogy and that rationale are both inapposite in the face of the organic restraints which our Constitution was intended and is held to impose upon governmental authority. We cannot foresee what the future may hold, and unborn generations may yet witness triumph of the right to such "redistribution" of the property of others. But before that Huxleyan advent, there will have to come some change in Amendment V, with a corresponding disfavor of the principle, known to us not later than Magna Carta, that one's freehold may be taken only "by lawful judgment of his peers, or by the law of the land."[8]

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8 "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, now will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land. We will not sell, nor deny, nor delay to any man either justice or right." Magna Carta (1225), Cap. XXIX, Pound and Plucknett, *Readings on the History and System of the Common Law*, 3d ed., page 180.

The legislature has found:

> Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land. . . .

Haw.Rev.Stat. § 516-83(3).[9] In fact, however, as the Circuit Court also found, on Oahu, the most populous Island with the most acute housing shortage, "there is only a 10 percent difference in the price between fee simple properties and comparable leasehold properties." *Midkiff v. Amemiya, supra* (Findings of Fact). The point is not that housing shortages do not exist in the Islands; it is that shortages of similar kind and degree exist in other of the 50 states, and so do constitutional limitations.

The thrust of the statute, therefore, is not nearly so much the providing of residential housing where it may not reasonably be had; it aims and objectives are to leave the residential supply as it exists, but to shift the fee from present owners to their lessees. And this in fact is all that the statute does.

In the Act before us the state legislature has simply decided that it prefers B's ownership of the land to A's, and the vesting of B with ownership of property heretofore lawfully held by A constitutes the statute's only substantive change. When, as here, the only variable presented is whether A or B holds title to the land, the public purpose vanishes. *See Thompson v.*

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9 While the legislature finds a shortage of fee simple residential property, it is significant that there is a surplus of condominiums on the islands. *See Midkiff v. Amemiya* (Findings of Fact), *supra*.

Consolidated Gas Utilities Corp., 300 U.S. at 80, 57 S.Ct. at 376.[10]

I conclude therefore that the taking authorized by the Hawaii Land Reform Act is not a taking "by the law of the land" and is therefore invalid under the Fifth and Fourteenth Amendments to the Constitution of the United States.

FERGUSON, *Circuit Judge*, dissenting:

The majority cavalierly decides that the legislature of Hawaii is forbidden by the federal constitution to carry out its program of residential land reform. In so doing, the majority has decided, wrongly, an issue that neither this court nor the district court should have reached in the first place. The majority has substituted its opinion for the careful judgment of the Hawaii state courts, and the Hawaii legislature, in "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Canton v. Spokane School Dist. # 81*, 498 F.2d 840, 845 (9th Cir. 1974), *citing Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498, 61 S.Ct. 643, 644, 85 L.Ed. 971 (1941). The majority has interfered with a state legislature's exercise of a power which is "an inherent attribute of sovereignty," *County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 P. 78 (1900), and which is " 'universally' recognized and 'necessary to the very existence of government.' " *City of Oakland v. Oakland Raiders, Ltd.*, 32 Cal.3d 60, 64, 183 Cal.Rptr. 673, 646 P.2d 835 (1982). "The right is the offspring

10 "For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have the power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good." J. Locke, *The Second Treatise of Government (An Essay Concerning the True Original, Extent and End of Civil Government* 138 (J. Gough 3d ed. (1966) at 71)).

of political necessity; and it is inseparable from sovereignty, unless denied by its fundamental law." *Kohl et al. v. United States*, 91 U.S. 367, 372, 23 L.Ed. 449 (1875). The majority labels the Hawaii legislature's attempt to exercise this fundamental sovereign power a "tyranny of the majority." But "concrete cases are not to be decided by calling names." *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir. 1946). My research has disclosed no case supporting the conclusion that the statute here at issue is unconstitutional on its face. To the contrary, precedent and common sense both point quite plainly to the opposite conclusion. I therefore dissent.

One commentator has already anticipated the problem that outsiders would have in comprehending the constitutionality of the Hawaii Land Reform Act.:

> The almost instinctive feeling that the Hawaii Act is radical may be based to some degree on an emotional reaction rooted in the assumption that since land is easily available on the open market to anyone who wants to buy it, no man should be forced to sell his land to another. This assumption, although valid in most parts of continental United States, is not valid in the island State of Hawaii.
>
> One factor that argues in favor of the Act and may be considered by the Court, if only subconsciously, is the current political reality that in much of the world land reform is essential if democratic forms of government are to emerge or to prevail. In both Asia and Latin America it is taken for granted that a redistribution of the land must be accomplished as a vital first step in carrying out reforms that will allow democratic governments to be established and survive. Land reform is necessary for the economic, political, and social health and stability of many of these nations.
>
> It would be anomalous and somewhat hypocritical if the United States Government were to insist that land reform be undertaken in other countries when its own Constitution prevented similar reforms in the American

States. True, there is a substantial difference between the State of Hawaii and a country like South Vietnam. The most obvious one is the difference between their economies—there are no peasants in Hawaii. But to recognize that difference is not to say that for the long-term political and economic health of Hawaii, land reform here is not as necessary as land reform is to the long-term development of South Vietnam. The existence of a monopoly that can control scarce land resources in Hawaii is dangerous because control of land in an island State represents more than the economic power that the land represents in dollar value.

The state's right to control other types of monopolies is clear; Hawaii's right to control and break up a land monopoly should be at least as clear considering the greater danger such monopoly poses to the political and economic health of an island State.

Conahan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969) [hereinafter cited as *Hawaii's Land Reform Act*].

The majority begins by asking the wrong question. It believes that it "must decide whether the Federal Constitution permits a state to take the private property of *A* and transfer its ownership to *B* for his private use and benefit." Maj. op., *ante*, at 790. But the land reform program does not simply transfer land from one owner to another owner for his private use and benefit; it transfers land from a handful of large owners to numerous small owners. Moreover, the "transfer" here can be accomplished only through the intervention of the Hawaii Housing Authority, which must find that the transfer accomplishes the public purposes of the Land Reform Act. Thus, the majority's analysis begins with a distorted account of what the statute actually does. The real question in this case is not whether a naked transfer of title solely for a person's private use is an unlawful taking. The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring

about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage. Having asked the wrong question, the majority predictably arrives at the wrong answer.

I. COMITY AND FEDERALISM

As I see it, the only questions presented to us by this case are, first, whether the district court should have abstained from deciding it on the merits; and, second, if not, what is the appropriate standard of review to be applied by a federal court in passing upon a facial challenge to a legislature's exercise of the power of eminent domain. The answers to both questions emanate from the joint principles of judicial restraint, comity and federalism, which counsel courts not to interfere unnecessarily with the exercise of legislative functions by substituting their judgment for that of legislatures on primarily legislative functions, and which counsel the federal courts not to interfere unnecessarily with the exercise of fundamental state powers.

Issues concerning land use within a state are not easily made a subject of federal concern. It is an essential attribute of a state's sovereignty to be able to use land to promote the commonweal. That is why a state may take land for a public use. Whether land is used to promote the common good must invariably depend on facts and circumstances that will vary from state to state.

Abstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case not only because the Land Reform Act is significant to the Hawaiian people, but because the case will now have an unfortunate impact on any future attempt by any state to experiment with land reform, regardless of whatever compelling needs may exist in a particular state. Hawaii faces a very difficult land situation. Judicial modesty should prevent us from thinking that we are in a better position than the Hawaiian legislature and courts to

judge the effectiveness and constitutionality of any attempt at reform.

The majority ignores the nature of our federalist compromise. The Constitution could have decided that states are merely administrative organs of the central government, but in fact the Constitution decided otherwise. States have been granted independent law-making power, the purpose of which is to provide their people with public benefits and services. There can be no more basic "benefit" than land.

One advantage often cited in favor of our federal system is that it allows a high degree of free play to the states. "It is one of the happy incidents of the federal system," Justice Brandeis wrote, "that a single courageous state may if its citizens choose serve as a laboratory and try social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

The Hawaii Land Reform Act is an important state experiment. The recognition that control over land is crucial to the existence of "the state as a state" is implicit in federal court decisions abstaining in state eminent domain proceedings. As the majority recognizes, *citing Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058 (1959), "a state's eminent domain proceeding is intimately involved with sovereign prerogative." Maj. op., *ante*, at 789, n. 1.

The power of eminent domain is a fundamental sovereign power of the states. Its exercise has always been a legislative function. The majority's decision to declare facially unconstitutional the statute before us is thus an extraordinary exercise of the federal judicial power. I find nothing in the statute so extraordinarily offensive as to call for such an exercise.

II. ABSTENTION

Abstention is appropriate in this case, basically, because without it the federal courts will be interfering unnecessarily in state judicial processes and judgments. Several more particular reasons for abstention are apparent upon closer examination.

A. *Younger* Abstention.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, teach that the federal courts ought to abstain from deciding cases which implicate important state interests, when those same issues are the subject of current adjudication in the state courts. Where state criminal proceedings are begun against federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the abstention principles of *Younger* may apply in full force. *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975). Today, seventeen years after *Hicks*, the policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Middlesex County Ethics Committee v. Garden State Bar Association*, ___ U.S. ___, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). In the instant case, state court proceedings were pending before any proceedings of substance on the merits had taken place in federal court.

State administrative proceedings preceded the plaintiffs' filing of their complaint herein in federal district court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, a move that was later enjoined by the federal district court. Meanwhile, in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii Ct.App. filed June 29, 1978) (complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum issued extensive findings of fact and upheld the constitutionality of the Hawaii Land Reform Act.

Not until February 28, 1979 did the plaintiffs in the instant case file their complaint in federal court. On November 14, 1979, the district court held a hearing on the initial motion for summary judgment. But by then, three condemnation suits were already pending in the state court. Civ. Nos. 59201, 59202 & 59191. These suits were eventually settled. On April 3, 1980, a subsequent motion for partial summary judgment was heard in the federal district court. However, by then, a fourth condemnation proceeding was pending in the state courts. Civ. No. 60465. On June 10, 1980, the district court issued a final judgment and permanent injunction. *Midkiff v. Tom*, 483 F.Supp. 62 (D.C.Hawaii 1979). The fourth condemnation proceeding, however, was not settled until September 1981.

As of October 18, 1981, the date upon which we heard oral argument in this case, condemnation suits encompassing eighteen of the Trustees' subdivisions were pending in state courts. Thus, condemnation suits were continuously pending in the state courts from *before* the federal district court heard the initial motion for summary judgment until after we took this appeal under submission. It appears that such suits are still pending now.

On November 9, 1981, an interlocutory appeal was taken to the Hawaii Supreme Court on the issue of whether a particular condemnation under the Hawaii Land Reform Act was being done for a public purpose. *Hawaii Housing Authority v. George Li Brown*, Civ. No. 60945, Supreme Ct. No. 8489. In that case, the Hawaii Supreme Court denied lessees' motion to dismiss landowners' attack on the constitutionality of the Hawaii Land Reform Act. In so doing, the court stated, "it appears that the law does not favor the waiver of a claim that a statute is unconstitutional. . . . The constitutional issue in this case is of course an issue of public importance."

Citing both *Younger* and *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the Seventh Circuit held that a district court properly refrained from interfering with pending state court eminent domain proceedings. *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). Citing also *Louisiana Power & Light Co. v. City of*

Thibodaux, supra, the court noted the sensitive nature of federal court intervention in a state's eminent domain system. Also cited with approval was *Creel v. City of Atlanta*, 399 F.2d 777, 779 (5th Cir. 1968), which stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation proceeding:

> [T]he principal and essential issue is one properly for determination by the state courts. Not only is municipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding.

Ahrensfeld, supra, at 198. The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary.

Since important state interests are involved in the implementation of a state's land use policy, *Younger* abstention is fully applicable here:

> The importance of the state interest in the pending state judicial proceeding and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith harassment or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.

Middlesex County Ethics Committee v. Garden State Bar Ass'n, supra, ____ U.S. at ____, 102 S.Ct. at 2523. The constitutional issue in the case before us has been and remains before the Hawaii courts. Clearly the proper route of review for the instant case would have been up the state court ladder and then to the United States Supreme Court.

B. *Pullman* Abstention.

Even if there were no ongoing state proceedings requiring abstention under *Younger*, the principles announced in *Pullman, supra*, would call for abstention in this case. The Court in *Pullman* was confronted with an issue which was "more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U.S. at 498, 61 S.Ct. at 644. The Court observed that adjudication of the constitutional question might be avoided because the case also presented a potentially determinative issue of state law. Under those circumstances, the Court held, the district court ought to abstain from deciding the constitutional issue, as long as it appeared that a definitive ruling on the state issue could be obtained in the state courts "with full protection of the constitutional claim."

Pullman abstention is appropriate here, as there may well be an alternative to adjudicating the federal constitutional challenge to the land reform statute. The question concerning the meaning of public use need not be broached if the Hawaii Land Reform Act permits the state to continue to regulate the condemned property in some way to achieve the public goals of alleviating conditions such as inflation and land shortage. Whether the statute permits any continued regulation is a doubtful and possibly determinative issue of state law. By determining the issue on federal grounds, the majority deprives the state of legitimate opportunity to uphold the land reform program.

Furthermore, there has been no definitive ruling as to whether the statute is constitutional under the Hawaii Constitution, which has its own "public use" requirement. A judgment by the Hawaii Supreme Court that the statute was in conflict, either on its face or as applied, with the Hawaii Constitution, would eliminate forever the need for this or any court to decide whether the statute conforms to the requirements of the federal constitution.

The majority correctly points out that our court will only reverse the district court's refusal to abstain if such a refusal involves abuse of discretion. In the case at hand the district court did "abuse its discretion," and thus this court should overturn the decision. A leading article on abstention doctrine has persuasively argued:

> [B]efore abstaining in an authorization case, the federal judge should ascertain whether abstaining will serve any purpose by determining which way he would rule on the state law issue in the absence of abstention. If he would hold the program unauthorized, so that abstention might prevent interference with a state program, he should also ascertain whether the program would suffer irreparable harm from interference. The greater the harm, the more this factor weighs in favor of abstention.

Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine,* 122 U. of Pa.L.Rev., 1021 at 1126 (1974). Among the "imprecise factors" to be weighed in making the decision are "the degree of unclarity of state law; the extent to which error might harm a state program; and the extent to which the federal constitutional issue is sensitive and calls for swift adjudication." *Id.*

Here, the federal court's decision that the state's program is unconstitutional will irreparably damage the program. Moreover, the federal constitutional issue is complex and not one that demands immediate adjudication. And there is a possibility of a constitutional construction of the statute. *See* Parts III(C) & (D), *infra.* Thus, in this case the factors weigh in favor of abstention.

In making the decision to abstain in a particular case, a federal court must refer back to our system of federation. Some issues demand federalization. One thinks, for example, of the rights of women and minorities. Given our national history, women and blacks have suffered harms unique to our nation, not to any given state. Thus, it is not only feasible but necessary to protect such rights on a national basis. Rarely is it

appropriate for a court to abstain when it has before it a case addressing rights of women or minorities. *Los Angeles Unified School Dist. v. United States Dist. Court for the Central Dist. of California*, 650 F.2d 1004 (9th Cir. 1981) (Ferguson, J., dissenting). Certain kinds of issues are not easy to federalize. Land reform in particular presents a situation in which the problems of each state vary widely. An attempt to federalize takes away from the state an important power and robs its people of any attempt to reach an innovative solution democratically.

III. THE DOCTRINE OF PUBLIC USE

Having wrongly reached the merits in this case, the majority comes to the wrong conclusion about those merits. My analysis of the facts of this case and the applicable law convinces me that the statute under review is constitutional on its face. The majority errs, I think both by mischaracterizing the facts and by misconstruing the applicable law.

A. Standard of Review

If a federal court must consider the merits of a defendant's contention that a taking is not for a public use, the court should apply the proper standard of review. The court must give great deference to the state legislature's determination and to the ruling of the state's highest court. The standard of review is a narrow one. As a consequence:

> [T]he Court has never actually held a use to be private which the courts of a state, with their intimate knowledge of local conditions and requirements (and with the concurrence of the legislature or even of the people of the state), have declared to be public.

Nichols, *Eminent Domain* § 7.31[1] [1980]. Of course, this court has been unable to profit from the wisdom of Hawaii's courts, whose judges are intimately knowledgeable about the conditions of that state, because the federal proceeding has aborted the orderly adjudication of issues in the state courts.

The majority is cognizant of precedent requiring great judicial deference to a legislative determination that a use is a public use. *Berman v. Parker,* 348 U.S. 26, 31-32, 75 S.Ct. 98, 101-02, 99 L.Ed. 27; *United States ex rel. T.V.A. v. Welch,* 327 U.S. 546, 551-52, 66 S.Ct. 715, 717-18, 90 L.Ed. 843 (1946); *United States v. Gettysburg Electric Ry. Co.,* 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896).

The majority, however, incorrectly distinguishes those cases on the ground that they involve the review of congressional rather than a state legislative determination.

In the most recent of those cases, *Berman, supra,* Congress authorized a taking in the District of Columbia. "The power of Congress over the District of Columbia," the Court specifically noted, *"includes all the legislative powers which a state may exercise over its affairs." Berman, supra,* 348 U.S. at 31, 75 S.Ct. at 102 (emphasis added). In delimiting the scope of judicial review in eminent domain cases, the *Berman* Court referred to the narrow role that courts play in reviewing *state* legislation:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . *or the States legislating concerning local affairs.* . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman, supra, 348 U.S. at 32, 75 S.Ct. at 102 (emphasis added). In light of the firm language in *Berman,* I believe that it is not within our province to usurp the role of Hawaii's legislature.

The rule of deference was also set forth in *Welch, supra,* a case that preceded *Berman.* A commentator has remarked:

> [I]t could be argued that the Court in *Welch* was reserving to itself a greater discretion to review the acts of state legislatures in this area, but it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a state (in *Welch* the federal government condemned land in a state).

Hawaii's Land Reform Act, supra, at 37. Finally, *Gettysburg Electric Railway, supra,* 160 U.S. at 680, 16 S.Ct. at 429, cited with approval the rule "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." The Court in *Gettysburg* borrowed that rule from a standard work on municipal corporations—hardly a repository of lore about judicial review of congressional action.

The majority is unquestionably correct that it lies with the judiciary to make the ultimate determination of whether a use is public. This is merely a restatement of the principle of judicial review established in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). However, the majority is sadly mistaken if it believes that a restatement of the obvious negates the rule of judicial deference in eminent domain cases.

B. The *Fallbrook* Approach

The majority's approach to reviewing the taking issue comes closer to the mark when it states, "we must look at each case on an ad hoc basis," and quotes the language in *Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 159-60, 17 S.Ct. 56, 63, 41 L.Ed. 369 (1896), "[W]hat is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Unfortunately, the majority never analyses this case on the basis of its own particular facts and circumstances. Instead, the majority applies five mechanistic rules, described as "recurring facts and circum-

stances," derived from other cases. But general propositions do not decide concrete cases.

Before further considering the majority's wrong approach, it is instructive to consider the right approach of *Fallbrook Irrigation District, supra.* In that case, California had passed a law allowing irrigation districts to condemn property. In upholding the law, the court said:

> [I]n a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

Id. at 160, 17 S.Ct. at 64. *Fallbrook* is significant in two respects. First, in its emphasis on facts and circumstances, *Fallbrook* points to the significance that the shortage of water, an important state resource, has in determining whether a use is public. Second, *Fallbrook* stresses that the people of a state and members of her legislature have more familiarity than have strangers with the circumstances that justify a taking.

The reasoning in *Fallbrook* was reiterated in *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). *Clark* upheld

a Utah law that gave individual landowners the right to condemn surrounding private land to irrigate their own private land. Shortage of water in Utah also helped to justify the taking. The court again emphasized that peculiar conditions may exist in a particular state, and that great deference is due to the knowledge that a state's citizens possess about local conditions:

> Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them.

Id. at 367-68, 25 S.Ct. at 678. Similarly, the state courts and legislature of Hawaii must be assumed to be exceptionally familiar with the land shortages in Hawaii and to have an informed understanding of social and economic consequences that result from this peculiar fact. A review of the Hawaii legislature's findings in this regard is illuminating.

C. The Facts of the Case

In Hawaii, a special problem exists that did not exist in eighteenth century America: Land in that state is concentrated under the suzerainty of a few large landowners. The legislature of Hawaii has specifically found:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development had been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

1975 Haw.Sess.Laws Act 184 § 1, *cited* in *Midkiff v. Tom*, 471 F.Supp. 871, 876 n. 21 (D.Hawaii 1979). The Trustees as a group are the single largest private landowner on Oahu. They own 15.1% of all land and 22.1% of all privately owned land on the island. *Midkiff v. Amemiya*, Civil No. 47103 (Haw.Ct.App.1978). *Findings of Fact and Conclusions of Law*, June 29, 1978. Much of Hawaii's population is concentrated on the island of Oahu, the island on which Hawaii's most populous city, Honolulu, is located.

The legislature has specifically found that the concentration of land, coupled with the large landowners' policy of leasing rather than selling that land, has undesirable economic and social effects. Among the undesirable economic effects are

artificially high prices on leasehold units, the discouragement of the development of fee simple units, inequality of bargaining power that strongly favors the lessor in rental negotiations, and a decline in leasehold values after the renegotiation of leases. 1975 Haw.Sess.Laws Act 184 § 1(d).

The legislature has also found that residential leaseholds have undesirable social effects. In particular, the pattern of renegotiating leaseholds at ever higher and inflated prices aggravates

> the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

Id., 184 § 1(e).

The Hawaii legislature's findings and declaration of purpose are eloquent testimony to the need for a land reform program that will give persons an opportunity to own their own land. The following are excerpts from Hawaii Rev.Stat. § 516-83 (1976):

> There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;
>
> The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;
>
> Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are

situated[.] . . . Long-term leases . . . contain terms and conditions . . . that restrict their freedom to fully enjoy such land . . .;

The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated . . .;

. . . [T]he ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

. . . For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii . . .;

The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers

the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few

. . . .

. . . Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. . . .

The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii. . . .

. . . The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. . . .

The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose. . . .

Legislation providing to people who are lessees under long-term leases of residential land on which their homes

> are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

The majority calls none of these findings of fact into question. Indeed, they are scarcely mentioned at all in the majority opinion. They persuade me, however, that the land reform statute which they prompted is well within constitutional limitations. The Hawaii legislature believes that the redistribution of land is necessary to curb inflation, to meet the housing needs of the elderly, and to allow citizens of the state to enjoy fully the land on which their houses are situated. These substantial economic and social goals are legitimate state interests. Given the peculiar facts of land distribution in Hawaii, it cannot be said that the redistribution of land in that state is an arbitrary or capricious means of achieving these interests. I would hold that where property is taken to achieve such substantial benefits for the citizenry, the property is put to a public use.

D. *Eastern Sugar Associates*

A case very much on point is *People of Puerto Rico v. Eastern Sugar Associates, supra.* That case upheld the constitutionality of a statute similiar to the Hawaii Land Reform Act.

Relying directly on Laws of Puerto Rico Annotated, tit. 28, ch. 31 §§ 241, *et seq.*, a commentator has outlined the purposes of the Land Law of Puerto Rico:

> The Puerto Rican Legislature passed the Land Law of Puerto Rico which was designed to break up the corporate latifundia (i.e. large landed estates) in order to improve the economic, political, and social health of the Islands. An Authority was created under the provisions of the Law and was given the power to condemn land. The Authority was instructed to carry out the purposes of the Law by (1) breaking up the latifundia and preventing their reappearance, (2) assisting in the creation of a new class

> of landowners and farmers, (3) providing means for the *agregados* and slumdwellers to *acquire parcels of land on which to build their homes,* and (4) taking all actions necessary to achieve the most economic, scientific, and efficient enjoyment of land by all of the People of Puerto Rico. Later the Legislature passed the Vieques Law which directed the Authority to acquire the land of Eastern Sugar Associates on the Island of Vieques.

Hawaii's Land Reform Act, supra, at 38 (footnotes omitted). *Agregados* were heads of families dwelling on land that they did not own.

The Authority filed in a Puerto Rican court a petition to condemn the land of Eastern Sugar Associates. After removal of the case on diversity grounds, the district court dismissed the petition for condemnation. The appeal presented the issue: "[W]hether on the pleadings it can be said that the appellees' land is sought to be taken for a public use." 156 F.2d at 320.

The court in *Eastern Sugar Associates* gave great deference to the determinations of the Legislature of Puerto Rico: "We are not, of course, concerned with the wisdom, expediency, or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which it is clearly established we have nothing whatever to do." 156 F.2d at 323.

While giving deference to the Puerto Rican Legislature, the court recognized:

> Some public benefit or advantage must accrue from the transfer and mere financial gain to the takers is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of "an outside land speculation." . . . But the local Legislatures nevertheless have wide scope in deciding what takings are for a public use.

Eastern Sugar Associates, supra, at 323.

The deference owed to the Puerto Rican Legislature, like that owed to Congress when it acts in the District of Columbia,

see Berman v. Parker, supra, is easily explained: Congress conferred powers on the Puerto Rican Government which are "nearly, if not quite, as extensive as the general, residual powers of a state." *Eastern Sugar Associates, supra,* at 322.

The majority, attempting to distinguish *Eastern Sugar Associates,* makes much of the individual uses described in the Puerto Rican legislation to argue that the land that was taken underwent a change in use. However, the court in *Eastern Sugar Associates* refused to consider individually the particular uses:

> Each use plays a part in a comprehensive program of social and economic reform. *Thus we see no basis for analyzing each case separately. Instead we think the entire legislation should be regarded "as a single integrated effort," . . . to improve conditions on the island,* and so viewed we think enactment of the statutes within the power of the Insular Legislature.

Id. at 316 (citation omitted and emphasis added).

The court in *Eastern Sugar Associates* rejected the argument "that due process is denied because the purpose for taking the appellees' land is only to sell or lease it to others for them to use personally instead of for use by the general public." *Eastern Sugar Associates, supra,* at 316. The court found that this argument had already been rejected several times in Supreme Court cases: *Rindge Co. v. Los Angeles,* 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Vernon Cotton Co. v. Alabama Power Co.,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *Strickley v. Highland Boy Mining Co.,* 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906); *Clark v. Nash, supra; Fallbrook Irrigation District, supra.*

E. The Majority's Incorrect Approach

Even though the taking clause speaks of "public use," language that is broad in scope and not encompassed by a check list, and even though the precedents require an *ad hoc* approach, the majority nevertheless propounds five tests,

drawn, it says, from the cases, by which to determine whether the use here is public. I turn now to a brief examination of the majority's check list:

1. *Historically accepted public use.* This test is helpful only in those simple cases that represent no expansion of past public uses. But as the majority itself recognizes, the law of eminent domain had very humble beginnings in mill acts and in the building of roads. The history of public use has been a history of the expansion of the concept to accommodate new circumstances. Eminent domain has been used to condemn slum areas, *Berman v. Parker, supra;* to distribute land to squatters, *People of Puerto Rico v. Eastern Sugar Associates, supra;* and to condemn a football league franchise, *City of Oakland v. Oakland Raiders, Ltd., supra.*

2. *Change in the use of land.* The majority acknowledges that the Hawaii Land Reform Act may change the use of land; after condemnation, the land would be used exclusively for residential rather than investment purposes, and persons who own land outright are likely to treat it differently than tenants would. Maj. op., *ante,* at 796-797. The majority then offers the non-sequitur that these "alleged changes in use . . . are simply different forms of *private* use."

This argument by label, namely, that the change in use is merely a change in private use, conceals a serious confusion. The word "use" is susceptible to two entirely different meanings, namely, "employment" and "advantage."

There may be a change in private use, in the sense of a change in the private employment of land, such that a public advantage is conferred sufficient for the courts to hold that the land is now put to public use: the new private use in which the land is employed yields a public advantage. This occurred, for example, in *Clark v. Nash, supra,* a case in which an individual condemned private land to irrigate his own land. To dismiss an actual change in use as a mere change in "private use" is to ignore the possibility that a public advantage is thereby gained. The issue is whether the public advantage gained by a change in the private employment of land yields a public use.

3. *Change in possession.* The majority notes that a change in possession commonly occurs after a taking, then promptly cites two cases that undermine the rule.

In the instant case, continuous possession by the housing tract leaseholders is significant only because it favors their equities by diminishing possible hardships to the property owner. Whatever hardships might specifically burden a property owner who loses possession of house and land cannot be present in this case.

4. *Taking by the government.* The ultimate beneficiary of a valid taking is not the government: it is always the public. A taking by the government merely provides some insurance that it will be the public who benefits. To be sure, there is a danger, to which the courts must be alert, when the power of eminent domain is delegated to a private corporation. *United States v. Gettysburg Electric Ry. Co., supra,* 160 U.S. at 680, 16 S.Ct. at 429.

In the instant case, however, the state has not delegated authority to a private corporation. Indeed, insurance that the public will benefit is provided by the Hawaii Land Reform Act, which requires the Hawaii Housing Authority, a governmental body, to find that the purposes of the Act will be effectuated by a taking, and which vests discretion in the Authority, not in private individuals. Haw.Rev.Stat. § 516-22.

5. *De minimis taking.* The majority notes that courts have upheld the condemnation of land where the taking is *de minimis* and for the purpose of facilitating the development of nearby land. The majority cites two cases. Need one add that courts have upheld numerous takings that were not *de minimis?*

The sovereign powers of a state exist to promote the health, welfare, security and happiness of the people of this state—in sum, to promote the public interest. Whether the Hawaii Land Reform Act has been wisely chosen as a means for achieving the legislature's objectives is not for us to say.

> Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 564, 31 S.Ct. 259, 261, 55 L.Ed. 328 (1911).

CONCLUSION

I believe that the land reform program enacted by the Hawaii Legislature does not result in an unlawful taking of property. I also believe, however, that instead of reaching the merits of this question, the majority should have abstained in favor or ongoing state judicial processes. On both grounds I therefore register my dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Dec. 19, 1979

Civ. No. 79-0096

Frank E. MIDKIFF, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki and Myron B. Thompson, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

—v.—

Paul A. TOM, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N. C. Ing, Nobuyoshi Tamura, Andrew I. T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority; Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority; and Hawaii Housing Authority,

Defendants,

—and—

Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahaione Valley Community Association, Inc.; Kamiloiki Community Association; Lunalilo Marina Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association, Inc.;

Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund and Halawa Valley Estates Fee Conversion Corporation,

Intervenors.

AMENDED MEMORANDUM DECISION

SAMUEL P. KING, *Chief Judge.*

The Trustees of the Estate of Bernice Pauahi Bishop[1] filed suit in this Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act, now chapter 516 of the Hawaii Revised Statutes, was unconstitutional. Chapter 516 allows the State to use the power of eminent domain in order to condemn certain residential land and then sell it to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of chapter 516.

In Hawaii, a few landholders, including the Bishop Estate, own large tracts of residential land. It has been the policy of these landholders to offer long-term leases to individual lessees, rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of landholding as injurious to the well-being of the people of Hawaii, and adopted chapter 516 in order to allow long-term residential leaseholders the opportunity to buy in fee the land they occupy under a lease.

One of the provisions of chapter 516 provides for a compulsory arbitration procedure that sets the compensation to be

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1 In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls, known as the Kamehameha Schools.

paid the fee owners when the land is condemned. A broad temporary restraining order was issued by me on February 28, 1979, and a modified temporary restraining order, enjoining only the implementation of the mandatory arbitration provisions of the statute, was issued on March 27, 1979. A preliminary injunction, declaring those provisions unconstitutional was issued on May 8, 1979. D.C., 471 F.Supp. 871. In my opinion of May 8, 1979, I indicated that the remainder of chapter 516 was probably constitutional. Plaintiffs' constitutional challenge to the remainder of the statute is that the taking of property for the purpose of reselling it to the residential lessees is not for a public purpose, and hence violative of the Fifth Amendment command "[N]or shall private property be taken for public use, without just compensation."

Plaintiffs have urged this Court to conduct a trial, weigh evidence, and make what is in essence an *a priori* determination of whether the takings authorized by chapter 516 are for a public use. Plaintiffs intend to show that each and every legislative rationale for the statute is wrong.[2] They claim that if all the economic justifications for the statute are disproved, all that is left are social justifications—such as the social engineering goal of land redistribution. These social goals, contend the plaintiffs, cannot alone justify the taking as being for a public use. Plaintiffs concede that the legislative findings as to the economic justifications for the statute should be given deference, but argue that the standard for determining whether the taking is for a public use is *not* whether the legislative findings have a rational basis. They do not point to any particular standard to be used by the Court, except to say that the Court must make a new judicial determination. The plaintiffs indicated at oral argument that they view the question of whether the taking is for a public use as an economic and factual question rather than a legal one.

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2 Haw.Rev.Stat. § 516-83 (1976) contains a long list of legislative findings and declarations of purpose and necessity relating to chapter 516.

This Court disagrees. I must make a judicial determination of whether the taking is for a public purpose, but that determination is limited in scope to the question of whether the plaintiffs were denied substantive due process. The goal, the purpose, the *raison d'être* of the statute must be within the purview of the State's police power, and the means chosen by the Legislature to achieve that goal must not be arbitrary, capricious, or in bad faith. If the Court determines (1) that *any* possible rationale for the statute, expressed or not, is within the bounds of the State's police power, and (2) that the statute is not arbitrary or the product of legislative bad faith, then the statute is constitutional.

The starting point in any legal analysis is *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). In that case the Supreme Court held constitutional the District of Columbia Redevelopment Act of 1945. That Act provided for the comprehensive use of the eminent domain power to redevelop slum areas, and also provided for the possible later sale or lease of the condemned lands to private interests. The Court discussed whether the takings authorized by the Act were for a public purpose.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation omitted] or the States legislating concerning local affairs. [citations omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. [citations omitted]
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

348 U.S. at 32, 75 S.Ct. at 102. The Supreme Court viewed the question of whether the takings were for a public purpose in the same way that it viewed any substantive due process claim. The key question was whether the object of the statute was within the police power authority of the legislature.

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [citations omitted] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33, 75 S.Ct. at 103.

Some courts have taken an extremely narrow view of the judiciary's role in determining whether a taking is for a public purpose. In *United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975), Mr. Justice Clark was considering a claim that a taking was not for a public purpose because it was in aid of a commercial project.

> Though appellant's statement pieces together and rewrites different grounds from different objections, we will accept his version as the strongest presentation of his dual claims that the proposed taking was not for a public purpose and was arbitrary and capricious. Even under these circumstances, however, he has not alleged any sufficient defense. ***The only question for judicial review in a condemnation proceeding is whether the purpose for which property was taken is for a Congressionally authorized public use.*** [citations omitted] It is not for the courts to review the necessity of the taking. [citations omitted] Nor is it for the courts to consider broadside allegations

> that the purported public use to be served is merely a pretense or a sham to cover arbitrary official conduct. [citations omitted] Only in cases of egregious bad faith will the right to condemn be denied [citation omitted] for in those circumstances the taking may not be for a "public" use at all.

514 F.2d at 631-32 (emphasis added). Justice Clark's view was that courts could nullify a taking as not being for a public use *only* in the case of bad faith. There is no bad faith alleged in this case, and were this Court to adopt Justice Clark's test, the inquiry into the constitutionality of the statute would end immediately. However, some cases in this Circuit have indicated that judicial review may extend to the question of whether the taking is arbitrary and capricious.[3]

There are cases similar to Justice Clark's that indicate judicial inquiry ends when it is determined that a taking is for a Congressionally authorized use,[4] other cases that indicate inquiry is limited to determinations of bad faith or arbitrary action,[5] still others that say police power/due process standards are to be used in determining whether a taking is for a public purpose,[6] and even cases that pay lip service to the

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3 *See Southern Pacific Land Co. v. United States*, 367 F.2d 161 (9th Cir. 1966), *cert. denied*, 386 U.S. 1030, 87 S.Ct. 1478, 18 L.Ed.2d 592 (1967); *United States v. 18.2 Acres of Land*, 442 F.Supp. 800 (E.D. Cal. 1977).

4 *See, e.g., United States v. 255.25 Acres of Land*, 553 F.2d 571, 572-73 n. 2 (8th Cir. 1977).

5 *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058-59 (7th Cir. 1973); *United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963) (language of case somewhat unclear but seems to indicate that judicial determination of public purpose is limited to questions of bad faith or arbitrary action); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1278 (E.D.Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("We note that the court has no power to go beyond a determination that the legislative body has acted in bad faith or in an arbitrary manner").

6 *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946); *United States v. 67.59 Acres of Land*, 415 F.Supp. 545, 548-50 (M.D.Pa.1976).

proposition that a government taking for the purpose of transferring condemned property to private hands is not necessarily for a public purpose.[7]

After carefully considering all these cases, the Court has determined that the proper test to be used is that suggested by *Berman*—a police power/due process analysis. It would be irrational to have all government interferences with property rights except eminent domain judged by a substantive due process test, while eminent domain is judged by something else--whether stricter or not. Plaintiffs have cited many cases for the proposition that courts have great latitude in making judicial determinations of what is a public use. These cases, however, were almost all decided before 1930. At that time, to say the least, it took very little to invalidate a statute on substantive due process grounds. On the other hand, I believe those courts that say judicial review is extremely limited do so because they cannot conceive of legislative actions that are neither arbitrary nor in bad faith, yet still outside the limits of the police power. If the object of chapter 516 (or any one of several objects) is to further the health, safety, morals, or general welfare of the people of Hawaii, and if the means chosen to accomplish that object are rational and not in bad faith, the statute is constitutional.

Hawaii, as discussed earlier, has an uncommon system of landholding. A substantial part of all residential land is held by a few interests and leased to a large number of residential lessees. Plaintiffs, Trustees of the Bishop Estate, hold a significant portion of the residential land on Oahu. Section 516-83 of the Hawaii Revised Statutes is entitled "Legislative findings and declaration of necessity; purpose" and in it the Legislature sets forth numerous economic and non-economic rationales for

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7 *Washington-Summers, Inc. v. City of Charleston*, 430 F.Supp. 1013, 1014-15 (S.D.W.Va.1977) ("[I]t is equally clear that property cannot be taken by eminent domain for a predominantly private purpose"); *Amen v. City of Dearborn*, 363 F.Supp. 1267, 1279 (E.D.Mich.1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976) ("[I]ndustrial and commercial use by itself does not constitute a public purpose").

chapter 516. Plaintiffs argue that they can demonstrate that all the economic justifications for the statute are incorrect, and that the Legislature was wrong in enacting the statute. Yet, in order to uphold the constitutionality of chapter 516, this Court believes all it need do is look at the broadest possible rationale for the statute—that of redistributing residential land and changing the pattern of residential ownership in Hawaii. I believe this purpose is within reach of the police power, and hence the takings authorized by the statute are for a public purpose. All that the Court need rely on in the way of evidence to support this conclusion is the system of landholding in Hawaii—the concentration of land in a few large landholders. At the preliminary injunction hearing, there was testimony and documentary evidence concerning the way land is held in Hawaii. The Court believes that given this system of landholding, the Legislature had the right, pursuant to its police power, to conclude that the general welfare of the people of Hawaii was served by condemning the land of large landholder-lessors and allowing the lessees to purchase that land from the State. The Legislature had the right to conclude that Hawaii's system of landholding was injurious to the social and economic health of the community.

In *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946), the Legislature of Puerto Rico enacted the Land Law of Puerto Rico, a far-reaching program of agrarian reform that provided for the condemnation of privately owned land, and for its sale to private parties for residential use and farming. The Vieques Act, also passed by the Legislature of Puerto Rico, provided for the acquisition of land on two outlying islands for the purpose of renewing their sugar industry and establishing a distillery. Pursuant to these Acts, Puerto Rico petitioned the court to condemn 3100 acres of land held by Eastern Sugar Associates. Eastern Sugar challenged the condemnation, claiming the taking was not for a public purpose. The court first concluded that the test for determining public use was a due process test—not some *a priori* judicial determination of public purpose. The court

noted that "a taking of property from one, for the purpose of transferring it to another, without anything more, [does not necessarily conform] to due process of law." 156 F.2d at 323. However, all that was needed was "some public benefit or advantage" other than mere financial gain for the state. *Id.* The court then went on to note:

> In the first place a state's power of eminent domain does not necessarily have to be rested upon the ground that the taking is considered necessary for the public health, but may be exercised if the taking "be essential or material for the prosperity of the community." [citation omitted] And in the second place a local Legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity. . . . This [program] may be, as the appellees contend, "state socialism." But concrete cases are not to be decided by calling names. Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; [citation omitted] it is our duty to determine whether their enactment rested upon arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist.

156 F.2d at 324. In this case, the purpose of the statute is in no way to confer immediate monetary gains upon the State as some sort of land speculator. Looking only at one social goal of the legislation—that of redistributing the land—this Court could never say, regardless of how much "evidence" was presented by the plaintiffs, that the Legislature's belief in the social evils to be combated by chapter 516 was arbitrary. Social benefit alone is enough to bring a statute within the purview of the police power. It is true that the Puerto Rico statutes were a broader effort on the part of the Puerto Rican Legislature than was chapter 516 on the part of the Hawaii Legislature. It is true that the Puerto Rico statutes were more comprehensive

than chapter 516, and were enacted to combat what were perhaps more serious evils. Yet, it is the Legislature's province to determine just how far to go in trying to solve a problem or a series of problems. There are limits to legislative line drawing—those imposed, by, *inter alia,* the equal protection clause—but those are not at issue in this case. What is at issue is the right of the Legislature to conclude, as it did, "The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii." Haw.Rev.Stat. § 516-83(10) (1976).

In *Government of Guam v. Moylan,* 407 F.2d 567 (9th Cir. 1969), the court was considering a Guam redevelopment plan. Prior to World War II, Agana, the capital of Guam, was a patchwork of streets and lots going every which way. Agana was almost completely destroyed in the war, and the government decided to rebuild it. The government wanted, however, to have straight streets and lots. In order to achieve this goal, it condemned land simply to force consolidation of the odd lots. Its purpose was not to hold the land for any particular reason, but rather to sell the new even lots, after condemnation, to private individuals. The Ninth Circuit found that this constituted a public purpose. It is difficult for this Court to see how condemning land to have even streets is more for a public purpose than condemning land so that a large number of long-term lessees can have the opportunity to own the land they live on. Certainly the Hawaii Legislature's determination that the social well-being of the people of Hawaii is served by land redistribution is entitled to as much deference as was given the determination that the social and/or economic well-being of the people of Guam was served by having straight streets.

If the goal of the statute—that of land redistribution—is within the ambit of the State's police power, then the only remaining question for the Court is whether the means chosen to achieve that goal are arbitrary. There has been no suggestion by the plaintiffs that if land redistribution is a public purpose

the statute is nonetheless arbitrary. There are of course some lines drawn, but line drawing is always necessary in social legislation, and the scope of the Court's review of where those lines are drawn is very narrow. This Court finds that the Legislature's determinations of what land is subject to condemnation and who is entitled to repurchase from the State are in no way arbitrary or capricious.

Even were this Court's view that land redistribution constitutes a permissible public purpose encompassed by the police power incorrect, the Legislature has propounded many economic justifications for the statute. The following are excerpts from Haw.Rev.Stat. § 516-83 (1976).

> [S]erious shortage of fee simple residential land . . . .
>
> [A]rtificial inflation of residential land values in the State . . . .
>
> [T]he people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated . . . .
>
> [The leases] restrict their freedom to fully enjoy [their] land and . . . are weighted heavily in favor of the few landowners of such land . . . .
>
> [T]he economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values . . . .
>
> If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values. . . .
>
> Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to

> purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention . . . will help satisfy the pressing public necessity for a secure, strong and stable economy. . . .
>
> The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purpose of this chapter.

These are just some of the justifications for the act that are set forth in § 516-83. There is no doubt at all that these economic rationales, such as lowering prices and curbing inflation, are clearly encompassed by the police power. This has been the law of the land since the New Deal. The only question for judicial consideration is whether the means chosen by the Legislature to achieve these goals—chapter 516—is arbitrary. In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated. Plaintiffs have indicated that they could call many witnesses to show that the Legislature was wrong—that chapter 516 will not lower prices, curb inflation, or do anything else to help the people of Hawaii. Yet, it is not this Court's function to determine if the Hawaii Legislature was wrong. It is this Court's job only to determine whether the Hawaii Legislature acted arbitrarily in enacting chapter 516. No matter how much evidence plaintiffs were to present, they could not establish that the Legislature was arbitrary with respect to every economic rationale advanced in support of the statute. The Legislature determined that chapter 516 would bring down prices, and in our system of government that determination is for them and them alone to make. There are limits to judicial deference, but those limits are not even approached in this case. The Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court.

Since the question of whether the takings authorized by chapter 516 are for a public purpose is a legal one, and since this Court has made its determination, there is no point in this case proceeding any further on this issue. Defendants are entitled to summary judgment on the issue of the facial constitutionality of chapter 516, subject to this Court's prior rulings on the statutory provisions relating to mandatory arbitration and just compensation.

Defendants may prepare an appropriate order.

APPENDIX C

UNITED STATES DISTRICT COURT
D. HAWAII

May 8, 1979

Civ. No. 79-0096

Frank E. MIDKIFF et al.,

Plaintiffs,

—v.—

Paul A. TOM et al.,

Defendants,

—and—

Wai-Kahala Tract "H" Association, Inc., et al.,

Intervenors.

DECISION ON MOTION FOR PRELIMINARY INJUNCTION

SAMUEL P. KING, *District Judge.*

The Trustees of the Estate of Bernice Pauahi Bishop[1] filed suit in this court on February 28, 1979, against the Commis-

1 Plaintiffs refer to themselves as "Trustees of the Kamehameha Schools/Bishop Estate." The Kamehameha Schools were established in accordance with the wishes of Princess Bernice Pauahi Bishop as expressed in her will. The named plaintiffs are trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, appointed as such by the Supreme Court of Hawaii. *See Kekoa v. Supreme Court*, 55 Haw. 104, 516 P.2d 1239 (1973), *cert. denied, sub nom. Kekoa v. Richardson*, 417 U.S. 930, 94 S.Ct. 2641, 41 L.Ed.2d 233 (1974). The testamentary trust is commonly referred to as the Bishop Estate.

sioners and Executive Director of the Hawaii Housing Authority[2] and the Hawaii Housing Authority[3] itself, praying for a declaration that the Hawaii Land Reform Act[4] be declared unconstitutional.

A temporary restraining order against implementation of mandatory arbitration was granted pending a hearing and decision on a preliminary injunction.[5] That hearing was held on April 24-27, 1979.

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2 The Commissioners and Executive Director are sued in their individual and official capacities.

3 The Hawaii Housing Authority is "a public body and a body corporate and politic with perpetual existence" which is "placed within the department of social services and housing for administrative purposes." Haw.Rev.Stat. § 356-5(a) (1976). The authority is charged generally with the duty of carrying out the State's responsibilities under state and federal statutes with respect to housing. Haw.Rev.Stat. § 356-7 (1976).

4 1967 Haw.Sess.Laws Act 307, as amended by 1968 Haw.Sess.Laws Act 46, 1969 Haw.Sess.Laws Act 203, 1971 Haw.Sess.Laws Act 215, 1972 Haw.Sess.Laws Act 2, 1975 Haw.Sess.Laws Acts 184, 185, and 186, 1976 Haw.Sess.Laws Acts 159, 200, and 242, and 1978 Haw.Sess.Laws Act 140. These acts are set forth in Haw.Rev.Stat. ch. 516 (1976). *See also:* Haw.Rev. Stat. ch. 519 (1976). Plaintiffs attack specifically the provisions of § 516-1(14) (defining "owner's basis"), §§ 516-22 to 24 (authorizing condemnation), and §§ 516-51 to 55 (providing for mandatory arbitration).

5 A temporary restraining order was issued on February 28, 1979, in the form requested by plaintiffs. Upon reflection, I determined that this order was too broad. At a subsequent conference with counsel, I announced *sua sponte* that I would modify this order to make it clear that steps preliminary to arbitration were not enjoined. The Order Modifying Temporary Restraining Order was entered on March 27, 1979. By stipulation between plaintiffs and (then) defendants dated February 28, 1979, and entered as an order of the court on March 2, 1979, the expiration date of the temporary restraining order was extended from March 10, 1979, to March 14, 1979. A further extension from March 14, 1979, to April 24, 1979, was similarly stipulated to on March 7, 1979, and entered as an order of the court on March 9, 1979. A motion filed on March 20, 1979, by the O'Connor Intervenors to dissolve the temporary restraining order or in the alternative for security in the amount of $1,000,000 was denied on March 27, 1979. A motion filed on March 20, 1979, by the Bays Intervenors to modify the temporary restraining order was in effect denied on March 27, 1979, by the court's *sua sponte* modification in different language.

Motions to intervene were filed by several Bishop Estate lessee organizations.[6] All motions were granted on March 23, 1979.

At this stage of the proceedings, the evidence adduced and arguments presented concentrated on the facial constitutionality of Chapter 516 of the Hawaii Revised Statutes.[7] Some evidence related to the actual application of the law, but this was limited to setting the context within which the law was supposed to operate.[8] For purposes of the hearing, it was

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6 On March 7, 1979, by WAI-KAHALA TRACT H ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE-IKI COMMUNITY ASSOCIATION; and WAIAU COMMUNITY ASSOCIATION, all represented by Hoddick, Reinwald, O'Connor & Marrack, hereinafter sometimes referred to as the O'Connor Intervenors.

On March 8, 1979, by KAHALA COMMUNITY ASSOCIATION, INC.; and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND, represented by Carlsmith, Carlsmith, Wichman and Case, hereinafter sometimes referred to as the Bays Intervenors.

On March 12, 1979, by HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, represented by Kemper & Watts, hereinafter sometimes referred to as the Watts Intervenors.

7 It was not deemed appropriate to attempt to consolidate the hearing on the preliminary injunction with the hearing on the merits, as all parties desired to engage in extensive discovery. While much discovery can probably be avoided by pretrial conferences with the court, certain basic constitutional issues can be addressed immediately on stipulated facts with only limited testimony.

8 The Bishop Estate is an eleemosynary testamentary trust. The statute in question applies in terms to "all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands . . . and lands owned or held by the federal government." Haw.Rev.Stat. § 516-2 (1976). For purposes of this hearing, no distinction is made as to the power of the legislature to legislate with respect to the land holdings of a perpetual eleemosynary trust as opposed to the land holdings of private individuals.

agreed that the court could take as true the legislative findings set forth from time to time when this and related laws were enacted or amended.[9]

Chapter 516 authorizes the use of the State's power of eminent domain to permit lessees of residential lots to acquire the fee simple title to their homes.[10] The Hawaii Housing Authority is given the power and duty to carry out the provisions of this chapter.[11] The Authority established the position of Land Reform Administrator to handle this function and adopted regulations implementing the statute.[12]

The Trustees object to the application of this land reform statute to the Bishop Estate lands on three principal grounds. First, they say that the State's power of eminent domain cannot constitutionally be used for the intended purpose in that the benefits derived from such use inure solely to private individuals.[13] Second, they say that the statute unconstitu-

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9 Especially, the legislative findings in 1967 Haw.Sess.Laws Act 307 § 1, 1975 Haw.Sess.Laws Act 184 § 1, and 1975 Haw.Sess.Laws Act 186 §§ 1 and 2. 1975 Haw.Sess.Laws Act 186 § 2 is set forth in Haw.Rev.Stat. § 516-83 (1976). For the language of these findings, *see* note 21, *infra*.

10 Haw.Rev.Stat. §§ 516-21 to 45 (1976).

11 Haw.Rev.Stat. §§ 516-6 and 7 (1976).

12 Rule 10 of the Department of Social Services and Housing, Hawaii Housing Authority, State of Hawaii, approved by Governor John A. Burns on November 1, 1968, after a public hearing as required by Haw.Rev.Stat. ch. 6C (1955) (now Haw.Rev.Stat. ch. 91 (1976)), and subsequently amended to reflect statutory changes. The present AMENDED RULE 10 is entitled: A REGULATION PERTAINING TO THE HAWAII HOUSING AUTHORITY OF THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING, IMPLEMENTING ACT 307, SESSION LAWS OF HAWAII, 1967, AS AMENDED BY ACT 46, SESSION LAWS OF HAWAII, 1968; ACT 203, SESSION LAWS OF HAWAII, 1969; ACT 215, SESSION LAWS OF HAWAII, 1971; ACT 2, SESSION LAWS OF HAWAII, 1972; ACT 184 AND ACT 186, SESSION LAWS OF HAWAII, 1975; AND ACT 242, SESSION LAWS OF HAWAII, 1976.

13 Haw.Rev.Stat. § 516-30 (1976) provides for the sale to a lessee by the Hawaii Housing Authority of the leased fee interest to the lot leased by the lessee after the authority has acquired that leased fee interest. The lessee must qualify pursuant to Haw.Rev.Stat. § 516-33 (1976) and meet certain other requirements. This purpose of the law is spelled out in Haw.Rev.Stat. § 516-83(5) (1976) in the following language:

tionally mandates less than fair market value as compensation for the taking of the owner's leased fee interests.[14] Third, they

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> The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions [set forth in preceding subparagraphs] and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State.

If a lessee fails to purchase his leased lot, the authority becomes the lessor, subject to all the provisions of law applicable to lessors. Haw.Rev.Stat. §§ 516-30 and 31 (1976). Presumably the authority will not exercise its power to acquire a lessor's leased fee interest unless sufficient activity by lessees has taken place pursuant to Haw.Rev.Stat. § 516-22 (1976) and unless sufficient assurances of purchase by lessees have been received in the form of contracts to purchase as contemplated by Haw.Rev.Stat. § 516-30 (1976) and AMENDED RULE 10 § 17.

14 1967 Haw.Sess.Laws Act 307 provided in § 13 for payment upon condemnation of "the current fair market value of the tract diminished by the lessees' interests in the leased lots within the tract." A "lessee's interest" or "leasehold interest" was defined in § 2(h) to mean "the current fair market value of all on-site improvements, including all landscaping, walks, drives, walls, fences, buildings and betterments on the surface of the lot, paid for or required to be paid for by the lessee, plus the unamortized current replacement cost of all off-site improvements paid for or required to be paid for by the lessee, determined on the basis of current costs of installation of the same off-site improvements under the circumstances existing at the time of the original installation, and computed on a straight-line basis over the period of the lease, together with the lessee's value increment . . . ." The "lessee's value increment" was defined in § 2(i) to mean "the value of his interest in the residential use, enjoyment and amenities of the lot during the balance of the unexpired term of the lease, computed notwithstanding any provision to the contrary in the lease or any other contract; provided that such value shall in no event be less than ten per cent nor more than 15 per cent of the current fair market value of the unencumbered fee of the lot."

1968 Haw.Sess.Laws Act 46 in § 2e redefined the "compensation to be paid for the development tract" of Act 307 § 13 to be "the current fair market value of the tract, valued as if the fee title to the tract were unencumbered and the tract were undeveloped and unsubdivided, plus the unpaid balance owing to the lessor by lessees of the lots in the tract as reimbursement for the actual offsite improvement costs paid for by the lessor; provided, that in no event shall the compensation be less than the sum of the present worth of the future rental income stream under the leases to lots in the tract and the present worth of the lessor's reversionary interest in

say that the compulsory arbitration provisions of the statute violate constitutional guarantees.[15]

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the leased lots." This act also, in § 2b and c, deleted the earlier definitions of "lessee's interest" and "lesses's value increment" and substituted a definition of "off-site improvements" to mean "all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by occupants of all lots for whose benefits the improvements have been constructed or placed."

1975 Haw.Sess.Laws Act 184 again changed the provisions of Act 307 relating to compensation. Haw.Rev.Stat. § 516-24 (Act 307 § 13) was amended to provide that the "compensation to be paid for the leased fee interest in a residential houselot within a [development] tract shall be the owner's basis as defined in section 516-1(14)." "Owner's basis" was a new definition added to Act 307 § 2. This was defined as "the current fair market value of the lot excluding onsite improvements, valued as if the fee title were unencumbered, less the lessee's share, if any, of the current replacement cost of providing existing offsite improvements attributable to the lot, which replacement cost shall include an overhead and profit not exceeding twenty percent of the current replacement cost of the existing offsite improvements, or the original lot development credit to the lessee, whichever is greater, plus the unpaid balance, if any, owing to the lessor by the lessee as reimbursement other than as a part of the lease rent for the actual offsite improvement costs paid by the lessor." The definition of "offsite improvements" was expanded to make it explicit that "gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes" were included.

1976 Haw.Sess.Laws Act 242 made the final changes with which we are now concerned. "Owner's basis" was redefined as "the current fair market value of the lot." The definition then went on to provide that the "fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value." The definition continued with language which on its face seems to mandate that this value "shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest" and sets forth a method "(A)" (a discounted future rental income stream plus a discounted lessor's reversionary interest) and a method "(B)" (current market value less the lessee's interests). This act also provides for mandatory arbitration of compensation in advance of condemnation and that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceedings under this chapter." *See* note 24 *infra*.

15 Compulsory arbitration appears for the first time in 1976 Haw.Sess. Laws Act 242 § 4, adding a new Part IIA to Haw.Rev.Stat. ch. 516 entitled

In making a preliminary determination of these issues at this time, I am governed by the test enunciated in *Aguirre v. Chula Vista Sanitary Service,*[16] that is, that a preliminary injunction should issue " 'upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting preliminary relief.' "[17] I shall analyze each of the listed objections in the light of this teaching from *Aguirre.*

First, I am of the opinion that the State may use the power of eminent domain to redefine, rearrange, or redistribute interests in land.[18] Throughout recorded history, the manner in

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"MANDATORY ARBITRATION OF COMPENSATION" and consisting of five sections. Arbitration is instituted by the Hawaii Housing Authority if voluntary negotiations fail. In this event, assuming the required number of qualified lessees have applied to the authority to purchase the leased fee interest in their residential leasehold lots, "the Hawaii housing authority shall direct the lessor and lessee to submit to mandatory arbitration under chapter 658 [Hawaii's statute on agreements to arbitrate] to establish an amount of just compensation which shall be paid to lessor for the lessor's leased fee interest under section 516-24."

It is interesting to note that the House bill which ended up as Act 242 did not mention arbitration, the Senate amended to provide for arbitration by agreement, and the conference committee reported out a bill with the existing mandatory arbitration provisions.

16 542 F.2d 779 (9th Cir. 1976).

17 *Id.* at 781.

18 *See Clark v. Nash,* 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed.2d 1085 (1905) (upholding statutory authority given an individual in Utah to condemn an easement across another individual's land for the purpose of enlarging an irrigation ditch serving the condemnor's land); *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906) (upholding statutory authority given a mining corporation in Utah to condemn a right of way for an aerial bucket line across a placer mining claim of another individual); *Mt. Vernon Cotton Co. v. Alabama Power Co.,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (upholding statutory authority given a power company in Alabama to condemn private property for its purposes); *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding the District of Columbia Redevelopment Act of 1945); *People of*

which land is permitted to be held and used has been of critical importance to all members of a given society.[19] It is not enough to acquiesce in legislation that looks only to the future. The ingenuity of man could postpone the future to an unacceptable remoteness in time.[20]

Furthermore, the legislature has defined the public interest and the public purpose behind Chapter 516.[21] Whether or not

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Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664 (1946) (upholding Puerto Rico's statutory program for redistribution of land based on the territory's power of eminent domain); *Government of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969) (upholding Guam's urban redevelopment statute).

19 *See Public Land Policy in Hawaii: Major Landowners*, Legislative Reference Bureau, State of Hawaii, Report No. 3 (1967); *Public Land Policy in Hawaii: An Historical Analysis*, Legislative Reference Bureau, State of Hawaii, Report No. 5 (1969); *Green v. Frazier*, 44 N.D. 395, 176 N.W. 11 (1920), *aff'd*, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878 (1920).

20 *See* 3 J. REEVES, HISTORY OF THE ENGLISH LAW 324-25 (2d ed. 1787).

21 1975 Haw.Sess.Laws Act 186 § 2 (Haw.Rev.Stat. § 516-83). The section reads as follows:

> Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:
>
> (1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;
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> (2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;
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> (3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

the prohibition of the Fourteenth Amendment against depriving any person of property without due process of law is the

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(4) The economy of the State and public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

same as the prohibition of the Fifth Amendment against the taking of private property for public use without just compen-

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(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity, a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artificially inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter] is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this [chapter].

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State.

1967 Haw.Sess.Laws Act 307 §1 set forth the first legislative findings in this area as follows:

Findings and declaration of necessity The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article 1, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of

life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The term and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the

people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title to residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Relevant legislative findings are also found in 1975 Haw.Sess.Laws Act 184 § 1, Act 185 § 1, and Act 186 § 1 as follows:

ACT 184 FINDINGS AND PURPOSE

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing

their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have [sic] pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements, which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rental was increased) [sic], causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

ACT 185 FINDINGS AND PURPOSES

The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent

of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential household system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of

these increases has been to substantially increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as

determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g. a house appraised at $68,000 before renegotiation of lease rent has been appraised at $59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms; that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

ACT 186 FINDINGS AND PURPOSE

Act 307, Session Laws of Hawaii 1967, now Chapter 516, Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absolute or otherwise, to real property they are leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

sation,[22] under either Amendment "public use" includes "public interest."[23]

Second, I am of the opinion that the statutory definition of "owner's basis"[24] raises serious constitutional questions. The

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22 *See Chicago Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-41, 17 S.Ct. 581, 41 L.Ed. 979 (1897); *Rodgers v. Tolson*, 582 F.2d 315, 318 (4th Cir. 1978); *Gordon v. City of Warren*, 579 F.2d 386, 389-90 (6th Cir. 1978); *O'Grady v. City of Montpelier*, 573 F.2d 747, 750 n. 8 (2d Cir. 1978).

23 *See The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); *Nichols, The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. Rev. 615 (1940); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936); *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834 (1938). *See also* cases cited in note 18, *supra*.

24 Haw.Rev.Stat. § 516-1(14)(1976). The definition reads as follows:

> "Owner's basis" means the current fair market value of the lot. The fair market value shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value shall be determined by whichever following method provides just compensation and gives the greater consideration to the lessee's interest:
>
> (A) The sum of: (i) the future rental stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or
>
> (B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite improvements, established by a market data approach utilizing comparable sales, less the following:
>
> (i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

first two sentences of Haw.Rev.Stat. 516-1(14) are not objectionable.[25] Thereafter, the definition attempts to qualify "fair market value" and "just compensation" by setting forth two and only two methods by which just compensation "shall" be determined, and by mandating that method which "gives the greater consideration to the lessee's interest."[26] Without going

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(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;

(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sale, and similar fee;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions.

25 These two sentences equate fair market value of the leased fee interest with just compensation to the lessor. This accords with accepted Constitutional requirements. *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573, 575, 18 S.Ct. 445, 42 L.Ed. 853 (1898); *United States v. Miller*, 317 U.S. 369, 373-74, 63 S.Ct. 276, 87 L.Ed. 336 (1943).

26 Intervenors argue that the controlling phrase is "just compensation" and the rest of the definition must be read in that light. Thus if method "(A)" results in "just compensation" and method "(B)" does not, but method "(B)" gives "the greater consideration to the lessee's interest,"

into the details of Method A[27] and Method B,[28] it is clear to me that the definition can pass constitutional scrutiny under the Fourteenth Amendment only if everything after the first two sentences in this definition of "owner's basis" is ignored. That, in essence, is what I understand defendants and intervenors to argue that I should do.[29]

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method "(B)" is not to be used. Actually, the definition is logically incomplete as it does not provide for the circumstance wherein "just compensation" and "the greater consideration to the lessee's interest" do not both result from applying the same method. Beyond that, the definition is semantically inconsistent in that the use of a method that gives the lessee's interest greater consideration implies that that method gives the lessor's interest lesser consideration, which leaves the meaning of "just compensation" understandable only in terms of a dialect of newspeak.

27 Haw.Rev.Stat. § 516-1(14)(A) (1976), *supra* note 24. The method described is agreed by all testifying experts to be one acceptable method of determining fair market value of a leased fee interest, except that the discount rate should be determined by market conditions and not fixed by statute. The testimony was to the effect that application of the statutory formula resulted in a discount rate the same as or somewhat more favorable to the lessor than the discount rate in the market. While the method appears to be straight forward and definite, intervenors' experts testified that there were some six judgment calls that had to be made by an appraiser in using this method.

28 Haw.Rev.Stat. § 516-1(14)(B) (1976), *supra* note 24. Again all experts agreed that the *general* approach is one acceptable method of determining the fair market value of a leased fee interest. Plaintiffs' experts testified, however, that if followed literally, the method as defined could not result in "just compensation." Intervenors' experts testified that the method was presently rather useless because of the paucity of market data, and that the itemization of what to deduct was considered to be more of a checklist than a required list of items to be valued. Intervenors' appraisers considered items (ii), (iii), (iv), and (v) to be included under item (i), and all experts had difficulty accommodating item (vi).

29 One difficulty with the detailed and restrictive approach of § 516-1(14) is that it purports to exclude any method other than method "(A)" and method "(B)" as therein defined. But intervenors' experts testified that they did not consider themselves to be so restricted by the statutory language. Neither expert, in applying the statute, actually compared the results ob-

Third, I am of the opinion that the mandatory arbitration provisions of Part IIA[30] are unconstitutional on their face.[31] The statute provides that mandatory arbitration shall be in advance of and not any part of any action in eminent domain,[32] that mandatory arbitration shall be conducted and carried into effect before a condemnation action has been commenced,[33] and that the purpose of the mandatory arbitration is "to establish [the] amount of just compensation which will be paid to lessor for the lessor's leased fee interest" in the event of condemnation.[34] All defendants agree that the lessor

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tained by applying method "(A)" with the results obtained by applying method "(B)" to determine which method gave "the greater consideration to the lessee's interest," and both, in applying method "(A)" built in an inflation factor which offset the mandatory discount rate. In effect, they decided what in their opinion present fair market value of the leased fee interest in a lot amounted to, and then adjusted the several judgment calls involved to justify this opinion.

30 Haw.Rev.Stat. ch. 516 Part IIA (1976).

31 It is assumed, for purposes of this hearing, that we are only considering the application of these provisions to leases executed prior to June 15, 1976, the date this part took effect.

32 Haw.Rev.Stat. § 516-51(b) provides:

> This mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain.

33 Haw.Rev.Stat. § 516-53 (1976) provides:

> Timing of mandatory arbitration. Mandatory arbitration under this part shall be conducted and carried into effect before a condemnation action has been commenced.

34 Haw.Rev.Stat. § 516-51(a) (1976) provides:

> Mandatory arbitration of compensation authorized. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If negotiations fail then the Hawaii housing authority shall direct the

eventually is accorded a right to a jury trial on the issue of just compensation,[35] that just compensation is equivalent to fair market value,[36] and that fair market value is to be determined by the jury based on all relevant evidence.[37]

The statute provides that the "effect of the arbitration award and all matters relating thereto shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter."[38] But the mandatory arbitration is to proceed pursuant to Haw.Rev.Stat. Chap. 658,[39] which provides for proceedings in a circuit court confirming, vacating, modifying, or correcting an award, and a further appeal to the State supreme court.[40] By the time these procedures have been

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lessor and lessee to submit to mandatory arbitration under chapter 658 to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest under section 516-24.

35 Haw.Rev.Stat. § 516-23 (1976) provides in part that "the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101." Haw.Rev.Stat. ch. 101 (1976) contains Hawaii's general statutory provisions relating to eminent domain. § 101-11 provides that "the procedure shall be the same as in other civil actions." This includes the right to a jury trial on the issue of compensation or damages. *See State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967).

This is not to say that a State may not employ other procedures for determining just compensation. *See Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); 12 Wright And Miller, Federal Practice And Procedure § 3055 (1973). Here, mandatory arbitration is specifically stated *not* to be any part of any action in eminent domain. *See* notes 32 and 33, *supra*.

36 *See* cases cited in note 25 *supra*.

37 *See United States v. Miller*, 317 U.S. 369, 373-75, 63 S.Ct. 276, 87 L.Ed. 336 (1943).

38 Haw.Rev.Stat. § 516-55 (1976).

39 Haw.Rev.Stat. § 516-51(a) and § 516-54(a)(6) (1976).

40 Haw.Rev.Stat. § 516-54(a)(6) (appeal to circuit court), § 658-8 (award; confirming award), § 658-9 (vacating award), § 658-10 (modifying or correcting award), § 658-15 (appeal when) (1976).

completed, considerable time will have elapsed.[41] Yet the date of valuation in condemnation is the date of designation by the Hawaii Housing Authority,[42] which has no necessary relationship to the date as of which "just compensation" is determined pursuant to the mandatory arbitration, and would be expected to come after the final completion of the mandatory arbitration proceedings and a further refusal by the lessor to convey.[43]

And then when the final judgment has been entered determining the arbitration award, the lessee does not have to purchase the lessor's leased fee interest,[44] and the Hawaii Housing Authority does not have to commence condemnation proceedings.[45] Nevertheless, and even if there is a purchase or a

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41 "The Supreme Court of Hawaii is falling alarmingly behind in disposing of its expanding caseload. The current backlog is sufficient, given existing disposition rates, to occupy the Court for three years." Levinson, *Appellate Caseload in Hawaii,* 13 HAW.BAR J. (No. 3) 3 (1977).

42 Haw.Rev.Stat. § 516-24 provides that the compensation to be paid for the lessor's leased fee interest "shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition."

43 The mandatory arbitration provisions of the chapter do not specify the date as of which "just compensation" shall be determined. Presumably the arbitrators will specify the date they have used in reaching their award. § 516-51(a) does provide that the purpose of the mandatory arbitration is "to establish an amount of just compensation which will be paid to lessor for the lessor's leased fee interest" under § 516-24. But for the latter purpose, by § 516-24, just compensation is to be determined as of the date of designation, which by § 516-53 is supposed to come after the completion of arbitration. Since the arbitrators can hardly be expected to guess when the Hawaii Housing Authority will designate a development tract for acquisition, the date of valuation for purposes of mandatory arbitration and the date of valuation for purposes of condemnation will necessarily be different, by possibly several years.

44 The only effect of the arbitration award is that it "shall be prima facie evidence as to just compensation in any condemnation proceeding under this chapter." Haw.Rev.Stat. § 516-55 (1976).

45 Haw.Rev.Stat. § 516-51(b) (1976).

condemnation, the lessor must pay one-half of all expenses and fees of arbitration proceedings incurred by the arbitrators,[46] without reimbursement.[47] This in itself may be a taking of property without just compensation.[48]

Having reached the conclusions set forth above, I must still decide whether a preliminary injunction should issue and if so what should be enjoined. The statute in question contains a very comprehensive severability clause.[49] Thus, unless the statute must stand or fall as a whole, specific provisions that may be invalid may be separated out, leaving the other provisions in force.

I am of the opinion that those portions of the definition of the "owner's basis" to which the Trustees object are severable. I frankly do not believe that striking everything after the first two sentences in Haw.Rev.Stat. 516-1(14) would have any effect whatsoever on the operation of the statute or on the

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46 Haw.Rev.Stat. § 516-54(a)(5) (1976) provides:

> All expenses and fees of arbitration proceedings incurred by arbitrators shall be paid one-half by lessors and one-half by lessees.

47 Haw.Rev.Stat. § 516-23 (1976) provides in part that, after a designation pursuant to § 516-22:

> If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period [after designation], the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation.

There is no similar provision with respect to the expenses incurred as a result of the mandatory arbitration proceedings of Part IIA.

48 *See* 12 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3056 (1973); *Supplementary Report of the Advisory Committee on Rule Governing Condemnation Cases*, 11 F.R.D. 222, 243 (1951).

49 Haw.Rev.Stat. § 516-82 (1976). Although the statutory provision came from 1975 Haw.Sess.Laws Act 184 § 2, similar severability provisions were contained in 1967 Haw.Sess.Laws Act 307 § 44, and 1976 Haw.Sess.Laws Act 242 § 6.

manner in which appraisers value the lessor's leased fee interest.[50] In any event, there is no pending matter involving these objected-to provisions that requires a preliminary injunction.

I am of the opinion that the mandatory arbitration provisions of the statute likewise are severable. In fact, the statute as originally passed did not contain this part, which was added in 1976.[51] Unlike the objectionable features of the "owner's basis" definition, however, the Trustees are presently faced with a demand by the Hawaii Housing Authority to enter into mandatory arbitration pursuant to the statute.[52] As I have indicated that in my opinion the Trustees will probably succeed on the merits of this issue, I must determine whether there is possible irreparable injury to the Bishop Estate or a balance of hardships tipping decidedly toward the Trustees so as to make just and proper the issuance of a preliminary injunction en-

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50 *See* discussion in notes 26, 27, 28, and 29, *supra*. None of this language was in the original Hawaii Land Reform Act. *See* legislative history set out in note 13, *supra*.

51 *See* discussion in note 15, *supra*.

52 Letter dated January 22, 1979, from the Acting Executive Director of the Hawaii Housing Authority to the Trustees of the Bishop Estate informing the Trustees that the Commission of the Authority on January 18, 1979, had by a unanimous vote decided to invoke mandatory arbitration in connection with the leasehold to fee simple conversion of lots in Tract H as requested by the Wai-Kahala Tract H Association, Inc., and pursuant to the Authority's Rule 10, Section 10. The latter concluded with the directive that "the parties are ordered to begin mandatory arbitration upon receipt of this notice."

An earlier letter dated August 21, 1978, from the Land Reform Administrator to the Trustees notified the Trustees that Tract H petitioners had "asked to proceed to arbitration" and stated that "it is appropriate that the arbitration period required by that section [1976 Haw.Sess.Laws Act 242 § 4] commence." This letter advised the Trustees that "you have 30 days from the date of receipt of this letter to name an arbitrator; the petitioners are also naming an arbitrator." The Trustees refused to name an arbitrator. Among other grounds, they did not consider this letter as having been properly authorized.

joining the implementation of Part IIA of Chapter 516 of the Hawaii Revised Statutes.

A preliminary injunction limited to mandatory arbitration affects only one pending group of lessees of 102 lots.[53] It is not likely that many other lessees would be similarly affected for several months. Even those prevented by a preliminary injunction from starting the mandatory arbitration procedures may seek a designation pursuant to Haw.Rev.Stat. § 516-22 which would have the effect of fixing the date of valuation.[54]

On the other hand, the Trustees would be forced into a proceeding which could set a precedent affecting several thousand lots[55] and which could make them liable for an indeterminate amount in unrecoverable costs.[56]

As I balance the relative interests of the parties and of the public, I am of the opinion that the *Aguirre* test for the issuance of a preliminary injunction has been met.

The preliminary injunction shall be in the same form as the Temporary Restraining Order as modified on March 27,

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53 The only group of Bishop Estate lessees who have progressed to the point where the Hawaii Housing Authority may direct the lessor and lessees to submit to mandatory arbitration are those in so-called Tract H represented by WAI-KAHALA TRACT H ASSOCIATION, INC. Tract H comprises 102 lots.

54 Haw.Rev.Stat. § 516-22 and § 516-24 (1976). While Part IIA provides that mandatory arbitration shall precede condemnation, there is no requirement that mandatory arbitration shall precede designation.

55 While Tract H of 102 lots is the only Bishop Estate development tract which is presently at the stage when mandatory arbitration may be ordered, several other Bishop Estate tracts involving about 7,000 lots are going through the procedures established by the Hawaii Land Reform Act for leasehold to fee simple conversion.

56 From 1918 through March 1977, the Bishop Estate executed some 20,735 residential leases in development tracts. At present there are in force some 13,500 such leaseholds involving approximately 3,500 acres of land. 6,280 leases of lots in residential development tracts were executed from 1967 to 1977, inclusive.

1979,[57] with the further proviso that steps outside of Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.[58]

Intervenors suggest security in the amount of $1,000,000 to cover possible damages to lessees for a wrongful injunction. The Trustees suggested and posted security in the amount of $100 on the temporary restraining order. In my opinion, each lessee is adequately secured against inflationary or real increases in value by the lessor's leasehold fee interests in the lot leased by the lessee. This is not to imply that the lessees might have any claim. The injunction actually runs only against the Hawaii Housing Authority. I do believe, however, that a more substantial sum than $100 is called for, notwithstanding the financial resources of the Bishop Estate. Under the circumstances I believe security in the sum of $10,000 would be proper.

Counsel for the respective parties and intervenors shall attempt to agree upon a form of preliminary injunction for submission to the court on or about May 15, 1979, or in default of agreement, shall submit their respective suggestions on the same date.

The foregoing constitute the court's findings and reasons required by Rule 65(d) of the Federal Rules of Civil Procedure.

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57 Restraining only steps under Part IIA following a letter from the Hawaii Housing Authority directing the lessor and the lessee(s) to submit to mandatory arbitration.

58 Plaintiffs cannot be seriously damaged in the next several months as actual condemnation is not that imminent. In this area, a balancing of the interests of the parties and of the public leads me to the conclusion that a preliminary injunction should not issue, even if plaintiffs might ultimately prevail on their claim that the State's power of eminent domain may not be used to accomplish the purposes of the Hawaii Land Reform Act.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

--v.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed and remanded.

Filed and entered March 28, 1983.

[Dated June 27, 1983]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

[Filed June 17, 1983]

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—v.—

PAUL A. TOM, et al.,

Defendants-Appellees.

ORDER

Before: ALARCON, FERGUSON, and POOLE, *Circuit Judges.*

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for the appropriateness of rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and a majority of the judges of the court in regular active service have noted not to grant rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Joint Motion to withdraw the Petition for Rehearing and Suggestion for Rehearing En Banc is dismissed as moot.

The several Notices of Withdrawal of the above Joint Motion are dismissed as moot.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

[Filed July 15, 1983]

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—v.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

NOTICE OF APPEAL

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoski Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y. K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated

March 28, 1983, under 28 U.S.C. § 1254(2). Rehearing and rehearing en banc were denied in this case on June 17, 1983.

DATED: Honolulu, Hawaii, July 14, 1983.

/s/ TANY S. HONG
Attorney General

LAURENCE H. TRIBE
Special Deputy Attorney General

MICHAEL A. LILLY
First Deputy Attorney General

Attorneys for Defendants-Appellees

APPENDIX G

HAWAII REVISED STATUTES

CHAPTER 516*

RESIDENTIAL LEASEHOLDS

PART I. GENERAL PROVISIONS

SECTION

516-1 Definitions
516-2 Applicability
516-3 No Estoppel or Waiver
516-4 Trusts and Estates
516-5 Penalty
516-6 Administration of Chapter
516-7 Authority's Duties, Generally
516-8 Interested Members, Officers, or Employees

PART II. CONDEMNATION OF DEVELOPMENT TRACT

516-21 Applicability
516-22 Designation of Leased Fee Interest in All or Part of Development Tract for Acquisition
516-23 Exercise of Power of Eminent Domain
516-24 Compensation
[516-24.5] Exchanges
516-25 Interest Acquired
516-26 Interest in Compensation Paid by the Authority
516-27 Compulsory or Involuntary Conversion
516-28 Disposition, Generally
516-29 Notice of Disposition
516-30 Purchase of Leased Fee Interest

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* Reprinted here, in its entirety, is the version of Hawaii Revised Statutes, Chapter 516, as amended through the 1980 session of the Hawaii State Legislature, that was before the United States Court of Appeals for the Ninth Circuit on the appeal below. Additions or amendments to this statute that have since been enacted are not relevant to the appeal before this Court.

516-31 Disposition by Lease
516-32 Not for Profit
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PART I. GENERAL PROVISIONS

§ 516-1 Definitions. Unless otherwise clear from the context, as used in this chapter:

(1) "Authority" means the Hawaii housing authority created by chapter 356.

(2) "Development tract" means a single contiguous area of real property not less than five acres in size which has been developed and subdivided into residential lots. Two or more pieces of real property shall be considered as a single contiguous area if they would be contiguous except for the interposition or existence of a road, street, stream, fee lot, or other like interference.

(3) "Fair market value" means that amount of money that a purchaser willing, but not obliged, to buy an interest in land would pay an owner willing, but not obliged, to sell it, taking into consideration all uses to which the land is adapted or might in reason be applied.

(4) "Fee simple owner" and "fee owner" mean the person who owns the fee simple title to the land which is leased, including a life tenant with a remainder over, vested or contingent, and a holder of a defeasible estate, and his heirs, successors, legal representatives, and assigns.

(5) "Lease" means a conveyance of land or an interest in land, by a fee simple owner as lessor, or by a lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, twenty years or more (including any periods for which the lease may be extended or renewed at the option of the lessee).

(6) "Leased fee" and "leased fee interest" mean all of the interests of the fee owner, lessor, and all legal and equitable owners of the land which is leased, other than the lessee's interests as defined by this chapter.

(7) "Legal and equitable owners" means the fee simple owner and all persons having legal or equitable interests in the fee or in the lessor's leasehold estate, including mortgages, developers, lienors, and sublessors, and their respective heirs, successors, legal representatives, and assigns.

(8) "Lessee" means any person to whom land is leased or subleased, and his heirs, successors, legal representatives, and assigns.

(9) "Lessor" means any person who leases or subleases land to another, and his heirs, successors, legal representatives, and assigns.

(10) The terms "lessor", "lessee", "fee simple owner", "fee owner", and "legal and equitable owners" include individuals, both masculine and feminine, and, except as to the term "lessee", the terms also include corporations, firms, associations, trusts, estates, and the State or its political subdivisions. When more than one person are the lessors, lessees, fee simple owners, fee owners, or legal and equitable owners of a lot, the terms apply to each of them, jointly and severally.

(11) "Lot", "houselot", "residential lot", and "residential houselot" mean a parcel of land, two acres or less in size, which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as a principal place of residence for one or two families.

(12) "Offsite Improvements" means all physical improvements such as, but not limited to, roads, sewer lines, sewage treatment plants, gutters, curbs, sidewalks, fire hydrants, street lights, land dedicated for public purposes and underground electric cables, constructed or placed in a subdivision off the lots intended for occupancy, which improvements are to be used in common by occupants of all lots adjoining such improvements or by the occupants

of all lots [for] whose benefit the improvements have been constructed or placed.

(13) "Onsite improvements" means all physical improvements placed on a residential lot intended for occupancy which improvements are for the benefits of occupants of that lot, including, but not limited to, dwelling units, garages, service buildings, stairs, walkways, driveways, walls, trees, shrubs, landscaping, and pools.

(14) "Owner's basis" means the value of the lessor's leased fee interest in the lot that would apply if such interests were normally traded on an open market. The fair market value of the owner's basis shall be established to provide the lessor with just compensation for his interests in the lot and shall take into consideration every interest and equity of the lessee in establishing that market value. The value may be determined by either of the following methods, or any other method which is normally used by qualified appraisers in establishing the fair market value of a lessor's leased fee interest in land:

(A) The sum of: (i) the future rental income stream for the lot for the term of the lease discounted to present worth from the expiration date of the lease; and (ii) the value of the lessor's reversionary interest in the lot discounted to present worth from the expiration date of the lease. The discount rate shall be based on the maximum rate of return for insured passbook demand saving account paid by the savings and loan institutions in Hawaii plus three and three-fourths per cent; provided, however, that the discount rate may be modified by mutual agreement of the lessor, lessee, and the authority; or

(B) The current fair market value of the lot, valued as if it were a fee simple lot and as if the fee title were unencumbered, and excluding onsite im-

provements, established by a market data approach utilizing comparable sales, less the following:

(i) The value of the lease, including any rights therein, if any, which accrues to the lessee;

(ii) That percentage of the general enhancement of the neighborhood which has been paid for or contributed directly or indirectly by the lessee;

(iii) The current replacement cost of that portion of existing offsite improvements, including overhead and profit at prevailing rates, which were paid for or otherwise contributed directly or indirectly by the lessee;

(iv) That percentage of the general enhancement of the development tract and the lot caused by the onsite improvements on the lot paid for, or contributed, directly or indirectly, by the lessee;

(v) That amount, not otherwise deducted herein, allocated to the lot, which was paid for or otherwise contributed, directly or indirectly by the original lessee, computed at prevailing rates for overhead and profit in developing the development tract established by existing practice in the community; and

(vi) That amount for fees and costs which would ordinarily be borne by lessor in transferring such interest to lessee, including, but not limited to, attorneys' or realtors' commissions, other costs of sale, and similar fee;

provided, however, that the values established by any one of the foregoing shall not be duplicated in any one of the other provisions. [L 1967, c 307, § 2; HRS § 516-1; am L 1968, c 46, § 2a to d; am L 1975, c 184, § 2(1); am L 1976, c 242, § 1]

[am L 1978, c 140, § 1; am L 1979, c 227, § 1; am L 1980, c 39, § 2 and c 107, § 2]

§ 516-2 Applicability. This chapter applies to all lands leased as residential lots which are owned or held privately or owned by the State or its political subdivisions, except Hawaiian home lands which are subject to Article XI of the Constitution of the State and lands owned or held by the federal government. This chapter is not meant to supersede or preclude any other remedy at law available to residential leasehold lessees or the State, including those available under chapter 480. [L 1967, c 307, § 3; HRS § 516-2; am L 1969, c 203, § 1; am L 1975, c 184, § 2(2)]

§ 516-3 No estoppel or waiver. The rights granted to lessees by this chapter shall be effective, notwithstanding any provision in any lease or contract to the contrary. No lessee shall be estopped by an covenant, term, condition, or contract, however worded, from claiming the rights granted to him or otherwise be deemed to have waived such right. Any provision in any lease or contract contrary to the intent or purpose of this chapter is void. [L 1967, c 307, § 4]

§ 516-4 Trusts and estates. The rights granted to lessees by this chapter shall be effective, notwithstanding any condition or provision to the contrary in any instrument creating any life tenancy, defeasible fee, estate, or trust, regardless of whether such tenancy, fee, estate or trust was in effect prior to June 24, 1967 or is created hereafter, and the life tenant, holder, officer, or trustee of any such tenancy, defeasible fee, estate, or trust may convey residential leases for terms exceeding twenty years and shall perform all acts required of him by this chapter. Every such instrument now in existence or hereafter executed shall be construed in conformity with the intent and purpose of this chapter. No trustee, officer, or agent of a lessor or other legal or equitable owner shall, while acting pursuant to this chapter, be deemed to be acting in bad faith or to have committed a breach of trust. [L 1967, c 307, § 5; HRS § 516-4; am L 1975, c 184, § 2(3)]

§ 516-5 Penalty. Any person who violates this chapter shall be fined not more than $5,000 nor less than $1,000 or

imprisoned not more than one year, or both. All fines collected shall be deposited in the fee simple revolving fund created by this chapter. [L 1967, c 307, § 6]

§ 516-6 Administration of chapter. The Hawaii housing authority shall administer this chapter. [L 1967, c 307, § 7]

§ 516-7 Authority's duties, generally. In addition to any other duty prescribed by law and in this chapter, the Hawaii housing authority shall:

(1) Within six months after June 24, 1967, adopt and promulgate, in accordance with chapter 91, all rules and regulations necessary to effectuate the purposes of this chapter;

(2) Enforce this chapter and the rules and regulations adopted pursuant thereto;

(3) Subject to chapters 76 and 77, appoint and remove such adminstrative, technical, and clerical staff as it may require and prescribe their powers and duties; except that the authority may appoint, without regard to chapters 76 and 77, one or more appraisers on a part-time, contractual basis for the purposes set forth in this chapter;

(4) Establish such reasonable fees to be assessed and collected from lessees for the services of any appraiser;

(5) Disseminate information and render assistance to lessees of residential lots in order that this chapter may be understood and effectively implemented;

(6) Conduct an investigation upon any written complaint or whenever it appears to the authority that this chapter has been or is being violated. In such investigation, the authority may examine the books, accounts, records, and files of any person connected with the matter under investigation and conduct hearings. If the authority finds from satisfactory evidence that any person has violated or is violating this chapter, it may order such person to cease and desist from continuing the violation or engaging therein or doing any act or acts in furtherance thereof and, where necessary, it may bring an action in the

name of the State in any court of competent jurisdiction for enforcement of its orders;

(7) Acquire by eminent domain proceedings, all necessary property interests as provided in this chapter;

(8) Make and execute contracts, mortgages, and other instruments necessary or convenient to the exercise of the powers of the authority;

(9) From t me to time, require from the lessors of leases of residential lots and from all fee owners and legal and equitable owners of lots subject to such leases, such information as it may reasonably require in connection with the adminstration of this chapter;

(10) Do all things necessary and convenient to carry out the powers expressly conferred upon it by this chapter. [L 1967, c 307, § 8; HRS § 516-7; am L 1975, c 184, § 2(4)]

§ 516-8 Interested members, officers, or employees No member of the Hawaii housing authority or officer or employee administering this chapter shall acquire any interest, direct or indirect, in the ownership or development of any development tract other than by gift, devise, or inheritance, nor shall he have or acquire any interest, direct or indirect, in the financing or in any contract or proposed contract for services to be furnished or used in connection with or relating to the development of any development tract. If any such member, officer, or employee has or acquires an interest by gift, devise, or inheritance, direct or indirect, in any development tract or is a lessee of any residential lot affected by the eminent domain proceedings instituted under this chapter, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. The member, officer, or employee shall not participate in any action by the authority relating to the property, tract, or contract in which he has or acquires any such interest. Violation of this section constitutes misconduct in office and is cause for dismissal [L 1967, c 307, § 9]

PART II. CONDEMNATION OF DEVELOPMENT TRACT

§ 516-21 Applicability. This part applies to development tracts which are, at the time of acquisition of leased fee interests in residential lots within such tracts by the Hawaii housing authority as [provided] herein:

(1) Developed and subdivided into residential houselots occupied by lessees under leases executed before June 24, 1967;

(2) Developed and subdivided or partially developed into residential houselots occupied or to be occupied by lessees under leases executed after June 24, 1967, provided that ten or more years remain before the final termination of the lease term, and provided further that ninety per cent of the leases to the lots have been executed. [L 1967, c 307, § 10; HRS § 516-21; am L 1975, c 184, § 2(5)]

§ 516-22 Designation of leased fee interest in all or part of development tract for acquisition. The authority may designate all or a portion of a development tract for acquisition and acquire leased fee interests in residential houselots in such development tract, through the exercise of the power of eminent domain or by purchase under the threat of eminent domain after twenty-five or more lessees or the lessees of more than fifty per cent of the residential lease lots within the development tract, whichever number is the lesser, have applied to the authority to purchase the leased fee interest in their residential leasehold lots pursuant to section 516-33 and if, after due notice and public hearing, the time and place of which have been duly advertised in a newspaper of general circulation in the county in which the development tract is situated on at least three different days, the last publication being not less than five days before the date of hearing, the authority finds that the acquisition of the leased fee interest in residential houselots in all or part of the tract through exercise of the power of eminent domain or by purchase under threat of eminent domain and the disposition thereof, as provided in

this part will effectuate the public purposes of this chapter. [L 1967, c 307, § 11; HRS § 516-22; am L 1975, c 184, § 2(6); am L 1976, c 242, § 2]

§ 516-23 Exercise of power of eminent domain. Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing authority shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the authority shall exercise its power of eminent domain in the same manner as provided in chapter 101. If the development tract or applicable portion thereof, as the case may be, is not acquired or eminent domain proceedings are not instituted within the twelve-month period, the authority shall reimburse the fee owner, the lessor and the legal and equitable owners of the land so designated for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation. [L 1967, c 307, § 12; HRS § 516-23; am L 1975, c 184, § 2(7)]

§ 516-24 Compensation. The compensation to be paid for the leased fee interest in a residential houselot within a tract shall be the owner's basis as defined in section 516-1(14). The compensation shall be determined as of the date of the designation of the applicable portion of the development tract for acquisition. [L 1967, c 307, § 13; HRS § 516-24; am L 1968, c 46, § 2e; am L 1975, c 184, § 2(8)]

[§ 516-24.5] Exchanges. (a) The authority may exchange public lands for private lands to be condemned or involuntarily sold pursuant to this chapter; provided that any such exchange shall be subject to legislative disapproval; provided further that lands exchanged need not be of like-kind or comparable use; and provided further that no lands classified as conservation shall be exchanged for private lands.

(b) The authority may acquire private lands by negotiated sale for purposes of exchanging such land with private lands pursuant to subsection (a). The legislature declares that such acquisition is for the public purpose of encouraging home ownership on as widespread a basis as possible. [L 1975, c 184, § 2(21)]

§ 516-25 Interest acquired. (a) Upon acquisition of the leased fee interest in residential houselots within all or a portion of a development tract as provided in this part, the property interest acquired by the Hawaii housing authority is all of the right, title, and interest of the fee owner, and of the lessor and all legal and equitable owners, if any, in and to the residential houselots acquired; subject to existing leases of residential houselots within the development tract, and to all covenants, conditions, easements, reservations, and restrictions of record running with the land or contained in the agreement of sale, deed, or other conveyance held by the fee owner, lessor, and legal and equitable owners or permitted or suffered by lessees of existing residential houselot leases, which are not inconsistent with the intent of this part. The acquisition terminates all the right, title, and interest of the fee owner, lessor, and all legal and equitable owners, whether the interest be a remainder, vested or contingent, a reversion, or other beneficial interest in the property, present or prospective.

(b) If the leasehold is subject to any mortgage, lien, or encumbrance suffered or permitted by the lessee, including, but not limited to, rights arising through divorce, marriage, or assignment, the purchase of the leased fee by the lessee shall in no manner affect or impair the mortgage, lien, or encumbrance or the security afforded thereby to the holder thereof, and the leasehold shall continue, notwithstanding the purchase of the leased fee by the lessee, for the purpose and to extent necessary to avoid any impairment of such leasehold security, unless the holder of the leasehold mortgage, lien, or encumbrance shall in writing consent to the transfer thereof to the fee as herein provided. Upon the written consent by the holder thereof, each such mortgage, lien, or encumbrance to which

the leasehold is subject and to which such consent refers shall be transferred to and shall bind the fee acquired by the lessee, and shall thereafter continue in full force and effect as a mortage, lien, or encumbrance of the fee acquired by the lessee, in the same order and priority among such mortgages, liens, and encumbrances so transferred to the fee as the same applied to and bound the lessee's immediate, previous leasehold interest. [L 1967, c 307, § 14; HRS § 516-25; am L 1975, c 184, § 2(9)]

§ 516-26 Interest in compensation paid by the authority. The fee owner, lessor, and all legal and equitable owners shall share in the compensation paid by the Hawaii housing authority as their respective interests appear. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rentals shall share in such compensation paid by the authority to the extent of his interest as may be determined by agreement of those entitled to share in the compensation paid by the authority, or in the absence of such agreement, pursuant to chapter 658. [L 1967, c 307, § 15; HRS § 516-26; am L 1975, c 184, § 2(10)]

§ 516-27 Compulsory or involuntary conversion. It is the intent of the legislature, within the meaning of section 1033 or section 1231 of the Internal Revenue Code or the applicable provisions of chapter 235, Hawaii Revised Statutes, as well as all other statutes, rules, regulations, administrative orders, and legal interpretations within the federal and state governments relating to taxation, that any conveyance of title to property by a fee owner to the authority under this part shall constitute a compulsory or involuntary conversion (as a result of the exercise of the power of condemnation or the threat of imminence thereof), and that such fee owner shall not be deemed, by reason, in whole or in part, of any provision of this part or by reason of the execution by the fee owner of leases to the property and other properties subsequent to June 24, 1967, to hold the property primarily for sale to customers in the ordinary course of trade or business. [L 1967, c 307, § 16]

§ 516-28 Disposition, generally. It shall be the policy of the Hawaii housing authority to encourage the widespread fee simple ownership of residential lots situated within a development tract. Where necessary or desirable, the authority may lease the residential lots. Not more than one lot shall be sold in fee simple or leased to a purchaser or lessee. A husband and his wife together, unless separated and living apart under a decree of separation issued by a court of competent jurisdiction, shall be entitled to only one lot. [L 1967, c 307, § 17; HRS § 516-28; am L 1975, c 184, § 2(11)]

§ 516-29 Notice of disposition. Except in case of a sale of the leased fee interest to the lessee of a residential lot under lease, no sale or lease of any residential lots shall be made by the Hawaii housing authority unless it has published on at least two different days in a newspaper of general circulation in the county, a notice of its intent to sell or lease. The notice shall state, in general terms, the size, location, and prices or lease rentals of the lots to be sold or leased, the terms of the sale or lease, and the last date on which applications will be received by the authority, which date shall not be less than thirty days after the first publication of the notice. The notice shall also state the times and places at which more detailed information with respect to the sale or lease may be secured by interested persons. [L 1967, c 307, § 18; HRS § 516-29; am L 1968, c 46, § 2f]

§ 516-30 Purchase of leased fee interest. The lessee of a residential lot within a development tract, whether he was a lessee at the time of the acquisition or became a lessee after the acquisition of the development tract, who has applied to the authority and has qualified for purchase of the leased fee interest shall purchase from the Hawaii housing authority by contract within sixty days of acquisition of the interest by the authority, the leased fee interest to the lot, subject to the terms, covenants, and conditions of the contract executed with the authority; provided that the lessee is not then in default in the performance of his obligations under the lease; and further provided that should any of said lessees fail or refuse to enter

into such a contract, then in such event, each such lessee shall pay to the authority his pro-rata share of all costs incurred by the authority in the acquisition of the houselots within the development tract including but not limited to appraisal costs, costs of publication, and survey, and the authority is hereby authorized to take whatever action it deems necessary to collect such costs; and provided further that in case of a wilful breach of the purchase agreement the authority shall be entitled to any available remedy, including the sale of its interest in the houselot; and further provided that the sales price shall be at the lowest possible price consistent with section 516-32 and the purpose of this chapter. [L 1967, c 307, § 19; HRS § 516-30; am L 1975, c 184, § 2(12)]

§ 516-31 Disposition by lease. The Hawaii housing authority may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as it may determine. The leases shall be subject to all of the rights of lessees enumerated in part III of this chapter. The authority may, in its discretion, utilize any of the residential lots and rent out the same for periods of twenty years or less for the purposes set forth in chapters 356 to 360, or for any other purpose, all upon such terms and conditions as the authority may determine. [L 1967, c 307, § 20]

§ 516-32 Not for profit. It is declared to be the policy of the State that the Hawaii housing authority shall carry out its responsibilities under this part in an efficient manner so as to enable it to fix the sales prices and rentals for residential lots at the lowest possible rates consistent with the purpose of this part; and that the authority shall not administer this part for profit, or as a source of revenue to the State. To this end, the authority shall fix the sales prices for residential lots or rentals for lots at no higher rates or prices than it shall find to be necessary in order to produce revenues which (together with all other available moneys, revenues, income, and receipts of the authority from whatever sources derived under the administration of this part) will be sufficient: (1) to pay, as the same becomes due, the principal and interest on the bonds of the

authority; (2) to meet the cost of, and to provide for the administration of this part; and (3) to create a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve. [L 1967, c 307, § 21]

§ 516-33 Qualification for purchase. Except as otherwise provided under section 516-28, no sale of any residential houselot within a development tract shall be made to any person unless he meets the following requirements:

(1) Is at least eighteen years of age;

(2) Is a bona fide resident of the State or has a bona fide intent to reside in the development tract if successful in purchasing the lot;

(3) Has legal title to, or pursuant to an agreement of sale an equitable interest in, a residential structure situated on the leased lot applied for; provided that, for the purposes of this section, the vendor under such agreement of sale shall not be eligible to purchase the lot. An agreement of sale means an executory contract for the sale and purchase of real property which binds one party to sell and the other party to buy property which is the subject matter of the transaction;

(4) Has a letter of credit, certificate of deposit, proof of funds, or approved application from any lending institution demonstrating that he will be able to promptly pay the authority for the leased fee interest in the lot;

(5) Submits an application in good faith in such form as is acceptable to the authority;

(6) Executes a contract for purchase of the fee interest in such form as is acceptable to the authority; and

(7) Does not own in fee simple lands suitable for residential purposes within the county and in or reasonably near the place of business of such person or has or have pending before the Hawaii housing authority an unrefused application to lease or purchase a lot in a development tract. A person is deemed to own lands herein if he, his spouse, or both he and his spouse (unless

separated and living apart under a decree of a court of competent jurisdiction) own lands.

In the event of a wilful breach of contract of a lessee to purchase the leased fee interest, the authority may sell or assign its interest without respect to the requirements of this section.

The authority may require additional testimony or evidence under oath in connection with any application. The determination by the authority of any applicant's eligibility under this part shall be conclusive as to all persons thereafter dealing with the property; provided that the making of any false statement knowingly by applicants or other person in connection with any application shall constitute perjury and be punishable as such. The authority shall adopt rules and regulations pursuant to chapter 91 to effectuate the purposes of this section. [L 1967, c 307, § 22; HRS § 516-33; am L 1972, c 2, § 30; am L 1975, c 184, § 2(13)] [am L 1978, c 140, § 2; am L 1980, c 39, § 3]

[§ 516-33.5] Deposits by lessees. (a) The authority may require the submission of a deposit by any lessee applying to the authority for the purchase of a residential lot under this chapter. The amount of the deposit, not to exceed $500 shall be established by rule.

(b) No deposit shall be required to be made more than one hundred eighty days prior to the date estimated by the authority for condemnation of the development tract.

The deposit may be applied by the authority, after the acquisition of all or part of the development tract or the institution of eminent domain proceedings, to payment of appraisal, survey, and attorney fees the authority has incurred as a result of the designation, with the remainder of the deposit to be applied toward the purchase of the owner's fee interest. [L 1978, c 140, § 3]

§ 516-34 Mortgages, agreements of sale, other instruments. (a) If an applicant who wishes to purchase the leased fee interest in his residential leasehold lot is unable to obtain sufficient funds at reasonable rates from private lenders, the

Hawaii housing authority may, by way of mortgage, agreement of sale or other instruments to secure the indebtedness, loan to the purchaser up to ninety per cent of the purchase price; provided that such agreement of sale shall be for a term not to exceed three years; provided further that the authority, upon its discretion, may extend such agreement of sale for not more than two years if the lessee requests such extension. In case of any dispute of the extension of the agreement of sale, the lessee shall bear the burden of proof to show good cause for such extension.

(b) The purchaser of the leased fee interest shall pay not less than ten per cent of the price and execute with the authority an agreement of sale, or mortgage, or other instrument to secure the indebtedness under the terms of which the unpaid balance and the interest thereon, at a reasonable rate determined by the authority, shall be paid in monthly installments over such periods as the authority may determine. Every mortgage, agreement of sale, other instruments to secure the indebtedness, or instrument of indebtedness shall be freely assignable by the authority and may contain such other provisions as are usually found in such instruments and shall provide that the purchaser may prepay the whole or any part of the unpaid balance of the purchase price plus accrued interest at any time without prepayment penalty.

(c) If the purchaser defaults on the payment of any loan, the authority shall take all necessary action to collect the delinquent principal and interest on the loan and may take all actions allowed to holders of obligations, including the power to repossess, purchase, lease, rent, repair, renovate, modernize, and sell the property foreclosed. [L 1967, c 307, § 23; HRS § 516-34; am L 1968, c 46, § 2g; am L 1975, c 184, § 2(14)]

§ 516-35 Restrictions on sale and use of residential lots. (a) If state moneys are used for the purchase of the owner's basis, then for a period of ten years after the purchase from the authority of the leased fee interest in a residential lot, the purchaser shall not transfer any interest in the property unless he has first notified the authority in writing of his intention to do so.

The notice shall specify the purchaser's address and upon receipt of the notice, the authority shall have the first option to purchase the land at the original purchase price of the leased fee from the authority plus ten per cent a year from the date of said original purchase up to the time of repurchase or the fair market value at the time of repurchase, whichever is lower, plus the fair market value of the improvements; provided that title to a dwelling unit and the property or lease may pass to a family member by devise or through the law of descent, notwithstanding any qualifications set forth in section 516-33 or the rules and regulations established by the authority.

At the time of the repurchase, the fair market value of the land and the improvements shall be determined by a qualified appraiser, selected by the purchaser from a list of three appraisers provided by the authority, whose services shall be paid for by the authority; provided that the appraisal is subject to review by the authority prior to acceptance. If the purchaser disagrees with the value, he may appoint his own appraiser at his own cost and any further disagreement on the value may be resolved by negotiation or otherwise.

(b) Within sixty days after the receipt of the notice the authority shall in writing notify the purchaser at the address so specified whether it elects to exercise its option. The date of election to purchase shall constitute the date of valuation for repurchase. Nonpayment of the purchase price by the authority within ninety days from the date of election shall constitute a default and shall void the election and terminate the right to exercise the option by the authority. If the authority refuses, or fails within the sixty-day period to reply to the offer, the purchaser may sell the fee simple interest in the property, or lease the property for a period not to exceed one year, to any person, free from any price restrictions; provided that, if the purchaser leases the property, the purchaser shall, upon expiration of the term of the lease, again comply with the requirements of subsection (a) whenever the expiration date of the term of the lease is within the ten-year period stated in subsection (a); further provided that, if the purchaser notifies the authority of his intention to sell the property, but does not

sell or lease the property within two years after the date the notice was received by the authority, the purchaser must again comply with the requirements of subsection (a) if the ten-year period stated in subsection (a) has not expired.

(c) The authority may lease, rent, or resell, any lot and improvements purchased by it under this part.

(d) Any original lease, deed, agreement of sale, mortgage, and other instruments of conveyance issued by the authority under this part shall expressly contain the restriction on sale and use of the residential lot as prescribed by this section. [L 1967, c 307, § 24; HRS § 516-35; am L 1975, c 184, § 2(15); am L 1976, c 242, § 3]

[§ 516-35.1] Foreclosure and sale by mortgages. If the leased fee, fee simple title or lease to a lot, purchased or acquired from the Hawaii housing authority under this chapter is secured by a mortgage held by a lending institution authorized to do business as a lending institution either in the State or elsewhere in the United States, upon foreclosure of the mortgage, the leased fee, the fee simple title or the lease may be sold to any purchaser, including the holder of the mortgage, without regard to whether or not the purchaser is qualified under the provisions of this chapter to own or otherwise acquire the leased fee, the fee simple title, or the lease. The mortgage so held, and the interest so acquired by the purchaser on such foreclosure, shall be freely assignable, notwithstanding the provisions of section 516-35. The term, "lending institution," includes an insurer or guarantor of the obligation or condition of the mortgage, including the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, or any other federal agency and their respective successors and assigns or any lending institution authorized to do business in the State or elsewhere in the United States; provided, that the rights and powers of nongovernmental holders of mortgages shall not be any greater than those of the aforementioned federal agencies.

Notwithstanding any provision in this chapter to the contrary, in sales by the authority of the leased fee or the fee

simple title, or in leases of lots, the authority may waive or modify any restrictions contained in this chapter, if such waiver or modification is necessary to enable any of aforementioned federal agencies or any lending institution authorized to do business in the State or elsewhere in the United States to participate in any loan secured by a mortgage on the leased fee, the fee simple interest or the lease; provided any such waiver or modification shall not confer any greater rights or powers in the holder than those which would be required by the Federal Housing Administration. [L 1968, c 46, § 2i]

§§ 516-36 to 39 REPEALED. L 1975, c 184, § 2(16).

§ 516-40 Bonds as legal investments. The State and all of its public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, including savings and loan associations, all investment companies, insurance companies, insurance associations, and other persons carrying on an insurance business in the State, and all personal representatives, guardians, trustees, and other fiduciaries in the State may legally invest moneys or funds belonging to them or within their control and available for investment under other provisions of law, in any bonds or other obligations issued by the Hawaii housing authority under this part, and such bonds and other obligations of the authority shall be authorized security for all public deposits and shall be fully negotiable in the State. It is the purpose of this section to authorize any of the foregoing to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investments, retirement, compensation, pension, and trust funds and funds held on deposit, for the purchase of any such bonds or other obligations; provided that nothing contained in this section shall operate to relieve any person, firm, or corporation from liability for failure to exercise reasonable care in selecting investments or, in the case of a guardian or trustee, from liability for failure to exercise the judgment and care to observe the duties required of a guardian or trustee by sections 406-22 and 554-6. [L 1967, c 307, § 29; HRS § 516-40; am L 1976, c 200, pt of § 1]

§ 516-41 Exemption from taxation and assessments. The Hawaii housing authority and the property acquired by it under this part, if not leased or sold, are exempt from any and all taxes and assessments. Bonds, notes, debentures, and other evidences of indebtedness issued by the authority are declared to be issued for a public purpose and to be public instrumentalities and, together with interest thereon, shall be exempt from taxes. [L 1967, c 307, § 30]

§ 516-42 Investment of reserves. The Hawaii housing authority may invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control. No provisions with respect to the acquisition, operation, or disposition of property by other public bodies are applicable to the authority under this part unless otherwise specifically provided by law. [L 1967, c 307, § 31]

§ 516-43 Security for funds deposited. The Hawaii housing authority may, by resolution, provide that all moneys deposited by it shall be secured: (1) by any securities by which funds deposited by the state director of finance may be legally secured as provided in section [38-3], or (2) by an undertaking with such sureties as are approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies may give any such security for such deposits. [L 1967, c 307, § 32]

§ 516-44 Fee simple residential revolving fund. A fee simple residential revolving fund is hereby created. The funds appropriated for the purposes of this chapter and all moneys received or collected by the Hawaii housing authority under this chapter shall be deposited in the revolving fund. The proceeds in the funds shall first be used to pay the principal and interest on bonds or other indebtedness issued by the authority, or by the State, and then for necessary expenses of the authority in administering this part. [L 1967, c 307, § 33; HRS § 516-44; am L 1971, c 215, § 3]

§ 516-45 General obligation bonds. The director of finance may, from time to time, issue general obligation bonds in such amounts as may be authorized by the legislature, for the purpose of acquisition by the Hawaii housing authority of residential houselots within development tracts pursuant to chapter 516, part II or for the acquisition of suitable properties to exchange pursuant to section 516-24.5 or for the acquisition by the department of land and natural resources under section 171-50.1 of suitable properties for exchange pursuant to section 171.50.2 to effectuate the purpose of this chapter. The principal and interest of general obligation bonds issued pursuant to this section shall be reimbursed to the general fund from the fee simple residential revolving fund as provided in section 516-44. Pending the receipt of funds from the issuance and sale of general obligation bonds, amounts required within the limits of legislative authorization may be advanced to the Hawaii housing authority from the general fund of the State. Upon the receipt of the bond funds, the general fund shall be reimbursed the amount advanced. [L 1971, c 215, § 4; am L 1975, c 184, § 2(17)]

§ 516-51 Preliminary negotiation required. (a) Upon the filing of a petition by the number of lessees required by section 516-22 with the Hawaii housing authority, the authority shall request the lessor and the lessees or their designated agents to negotiate the just compensation which the lessees will pay to the lessor to acquire the lessor's interest in the development tract. If no agreement is reached within sixty days after the request to negotiate, the parties shall simultaneously exchange written final offers together with any appraisals, other documents, and any other expert opinions on which their negotiating positions were based. Copies of the final offers and related documents shall be submitted to the authority and the authority may use the information in determining, prior to commencing condemnation proceedings, the probability that lessees will be able to meet the financial requirements of section 516-33(4).

(b) This preliminary negotiation shall be in advance of and shall not constitute any part of any action in condemnation or

eminent domain. [L 1976, c 242, pt of § 4; am L 1980, c 107, pt of § 3]

§§ 516-52 to 55 REPEALED. L 1980, c 107, § 4.

PART III. RIGHTS OF LESSEES

§ 516-61 Applicability. Except as otherwise expressly provided, this part applies to all leases of residential lots existing and in force on June 24, 1967, and to all leases of residential lots executed thereafter.

Notwithstanding any term, condition, or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part. [L 1967, c 307, § 34; HRS § 516-61; am L 1968, c 46, § 2j]

§ 516-62 Discrimination. No person shall be denied the right to become a lessee of a residential lot, because of his race, religion, sex, ancestry, or a physical handicap. [L 1967, c 307, § 35; HRS § 516-62; am L 1976, c 159, § 8]

§ 516-63 Free assignability. Except as otherwise provided in section 516-35, a lessee may assign his lease at any time without the approval or consent of the lessor, and the assignee shall have the same rights and obligations under the lease as the original lessee; provided, that no such assignment shall be effective to transfer any interest in the lease unless the lessor has received (1) either a true executed copy of such assignment or written notice thereof, (2) a reasonable service charge, except in case of an assignment by way of mortgage or assignment to or by the Federal Housing Administration or Veterans Administration or the Federal National Mortgage Association or a foreclosure of mortgage or assignment in lieu of foreclosure, and (3) the written undertaking of the assignee to perform all obligations of the lessee under the lease, which undertaking may be incorporated in such assignment. No such assignment shall release the assignor from liability under the lease unless the lessor consents in writing to the assignment. A consent to the assignment shall be deemed a consent to the release of the assignor from liability under the lease. The lessor shall not require payment of any money for his consent except the service charge, nor withhold such consent unreasonably.

Any person acquiring the leasehold estate in consideration of the extinguishment of a debt secured by mortgage of the lease or through foreclosure sale, judicial or otherwise, shall be liable to perform the obligations imposed on the lessee by the lease only during the period such person has possession or ownership of the leasehold estate. [L 1967, c 307, § 36; HRS § 516-63; am L 1968, c 46, § 2k]

§ 516-64 Forfeiture. No forfeiture of the lessee's interest in a leasehold shall be declared by the lessor for the lessee's failure to pay the rent or otherwise to perform his obligations under the lease, unless the lessor has given written notification to the lessee of the default and has given the lessee at least thirty days within which to correct the default. [L 1967, c 307, § 37]

§ 516-65 Extension. From time to time during the first twenty years of the term of any lease, the lessee shall have the right to extend the lease term to fifty-five years, commencing on the first day of the calendar month in which the lessee gives written notice thereof to the lessor, subject to the following conditions:

(1) At the time the right to extend the lease is exercised, the unexpired term of the lease is less than fifty years;

(2) The extension is for the purpose of mortgaging the leasehold interest;

(3) The lessee is not then in default in any respect under the lease; and

(4) The notice is accompanied by payment of a reasonable service charge.

This section applies only to leases executed and effective subsequent to June 24, 1967. [L 1967, c 307, § 38]

§ 516-66 Lease rental. In every case of an extension under section 516-65 the annual lease rental during the first thirty years shall not exceed an amount determined as follows:

(1) Compute to nearest whole year, one hundred per cent of the unexpired period of fixed rent at the commencement of the extended term;

(2) Multiply the number of years computed in (1) by the fixed annual rent in effect immediately prior to the extension.

(3) Deduct from thirty years the number of years computed in (1) and multiply that difference by the annual rent determined by mutual agreement of lessor and lessee within thirty days after such extension or by arbitration in accord with chapter 658; and

(4) Add the amounts computed in (2) and (3) and divide that sum by thirty. This sum rounded to the nearest dollar shall be the annual rent for the first thirty years of the extended term; provided that such rent shall not without the consent of the lessor be less than the annual rent in effect immediately prior to such extension.

The annual rent payable hereunder for and during the remaining period of the extended term shall be determined by mutual agreement of the lessor and the lessee, or if they fail to reach such agreement at least ninety days before the commencement of the period, by arbitration in accordance with chapter 658. [L 1967, c 307, § 39; HRS § 516-66; am L 1975, c 184, § 2(18)]

§ 516-67 Zoning changes. A lessor, fee owner, or any legal or equitable owner applying for a change in zoning in any area shall notify all of his lessees within three-fourths miles of the land proposed to be rezoned of the application and its contents at least thirty days before filing the same before any public zoning authority. [L 1967, c 307, § 40]

§ 516-68 Rights to self-organization; remedies. Lessees in a development tract shall have the right of self-organization and the right to form, join, or assist each other in forming associations for their mutual benefit or to select representatives of their choosing to engage in bargaining with their lessor or to secure other mutual aid or protection as may be necessary or desirable with respect to their respective leasehold interests. No lessor or agent of the lessor shall interfere with, restrain, or coerce any lessee in the exercise of the rights granted by this

section or dominate or attempt to contral the formation of any such organization. Neither the lessor nor the organization or the duly authorized representative of a majority of the lessees shall refuse to bargain collectively in good faith with each other. In the event of any such refusal or violation of this section, either party may file a complaint with the Hawaii housing authority, and the authority, after due notice of hearing and hearings, may issue such cease and desist orders as shall be meet and just in the light of the evidence adduced. [L 1967, c 307, § 41]

§ 516-69 Sale of fee by lessor. No fee owner of any residential lot under lease shall sell the leased fee interest to the lot to any third party unless he has first given a written thirty-day notice to the lessee and the authority of such intention. [L 1967, c 307, § 42]

§ 516-70 Reversion of improvements. (a) This section applies to all leases of residential lands as defined by section 516-1(5).

(b) At the termination of any lease, or at the expiration of the lease term, the lessee may, if not then in default under the terms of his lease, remove all onsite improvements on the lot which were constructed at the cost of, or otherwise paid for by, the lessee, without compensating the lessor therefor. If the lessee notifies the lessor in writing within sixty days before the termination or expiration that he declines to remove such onsite improvements and if the lessee is not then in default under the terms of his lease, and if the lessor refuses to extend the term of the existing lease or to issue a new lease for a term of at least thirty years at a rental that is mutually agreeable to the parties or failing such agreement that is determined by arbitration pursuant to chapter 658, the lessor shall be required to compensate the lessee for the current fair market value of all such onsite improvements. Such improvements shall be appraised at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658. The compensation shall be determined by mutual agreement or in conformity with chapter 658,

and the compensation shall be paid within thirty days of determination. Such expense of arbitration shall be equally shared by both parties. [L 1967, c 307, § 43; HRS § 516-70; am L 1975, c 184, § 2(19)]

PART IV. JUDICIAL DECLARATION

§ 516-81 REPEALED. L 1975, c 184, § 2(20).

[§ 516-82] Severability. If any part, section, sentence, clause, or phrase of this chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining parts, sections, sentences, clauses, and phrases of this chapter, or the application of this chapter to other persons or transactions or circumstances, shall not be affected. The legislature hereby declares that it woud have passed this chapter and each part, section, clause, or phrase thereof, irrespective of the fact that any one or more parts, sections, sentences, clauses, or phrases of this chapter, or its application to any person or transaction or other circumstance, be declared unconstitutional or invalid. [L 1975, c 184, § 2(21)]

[§ 516-83] Legislative findings and declaration of necessity; purpose. (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have instead engaged in the practice of leasing their lands under long-term leases;

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State;

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are

situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land;

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands;

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and will promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State;

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the

welfare of all people of the State by improving their standard of living.

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values.

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few.

(9) Land, in common with other natural resources, is of finite quantity; a fact particularly obvious in Hawaii. In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artifically inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking

inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii.

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the proverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is

possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter.

(12) The use of the power to eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose;

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefore by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State. [L 1975, c 186, § 2]

For additional legislative findings and declaration, see L 1975, c 184, § 1].

APPENDIX H

HAW. SESS. LAWS 1967

ACT 307 S.B. 1128.

A Bill for an Act Relating to Residential Leaseholds, the Acquisition by the State Through Condemnation of Lands in Fee Simple and the Disposition Thereof, and the Rights of Lessees.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

GENERAL PROVISIONS

SECTION 1. **Findings and declaration of necessity.** The legislature finds that:

(a) A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the attainment of fee simple ownership of residential lots by the greatest number of people. Article I, section 2 of the State Constitution recognizes this goal when it states:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property . . . ."

(b) During the past few years, Hawaii's economy has expanded greatly and its population has grown rapidly. Concomitantly, the demand for single-family residential lots, especially in the urban areas of the State where the population growth has been concentrated, has increased sharply.

(c) The present-day land ownership system in the State is characterized by a concentration of the fee title to lands in the hands of a few. In the days of the Hawaiian monarchy, all of the lands were held by the Hawaiian kings and chiefs and a few

of their faithful followers. While the concentration of ownership of land in the hands of a few may have been well-suited to the needs of the people in the days of the monarchy, it is hardly suited to the needs of the people in modern Hawaii. Yet, the pattern of concentration of land ownership in the hands of a few has remained essentially unchanged since the days of the monarchy. Today, land ownership is centered not in the monarchical government, but in the hands of a few estates, trusts and other private landowners. At least three-fourths of all privately held land in the State are currently owned by this small group of owners. Much of this land is in the rapidly developing urban areas of the State, where the need for single-family residential lots is critical.

(d) This critical shortage of land has led large landowners to enter into complex arrangements, such as development contracts, master leases, participating leases, subleases and leases with developers. The terms and conditions of these arrangements were at that time heavily weighted in favor of the lessors or fee owners against the developers and those who participated in the development or share in the lease rentals. Neither did the participants in the private arrangements or contracts or leases contemplate, at that time, the wholesale condemnation of private leased residential lots by the State as provided in this act.

(e) The few landowners have, over the years, permitted some of their urban lands to be developed into single-family residential lots. However, because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands.

(f) The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple

property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

(g) The shortage of single-family, residential, fee simple property, and the restriction on the people of a real choice between fee simple and leasehold residential property have in turn caused land prices for both fee simple and leasehold residential lots to become artificially inflated and have enabled lessors to include in residential leases terms and conditions that are financially disadvantageous to the lessees, restrict unduly their freedom to enjoy their leasehold estates and are weighted heavily in favor of the landlord as against the lessees.

(h) In the next twenty years, it appears that the few, large landowners will continue to permit the development of leasehold, rather than fee simple, residential lots in counties exceeding 100,000 persons in population, unless legislation is enacted to reverse this trend.

(i) Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that lessees require certain statutory protection of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

(j) The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

The legislature declares as a matter of legislative determination that:

[Sections 2-46, omitted.]

APPENDIX I

HAW. SESS. LAWS 1975

ACT 184

S.B. NO. 1200

A Bill for an Act Relating to Residential Leaseholds.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

(a) The fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 per cent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 per cent of all land.

(b) The small number of landowners have continued to follow the policy of not selling their lands for residential use but of leasing their lands under long-term residential leases. While fee simple ownership still accounted for 68.9 per cent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 per cent of all owner-occupied housing units developed on Oahu had been on leasehold. Between 1967 and 1972, 46 per cent of such development has been on leaseholds. In 1973, leaseholds constituted 32 per cent of all owner-occupied housing, more than double the percentage in 1960.

(c) The foregoing developments have compelled thousands of people in the State to resort to leaseholds to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

(d) Residential leaseholds have had and continue to have the following undesirable economic effects:

(1) The scarcity of fee simple residential lands have pushed the price of fee simple residential units to high levels;

(2) The high levels of fee simple residential unit prices have artificially raised the level of prices for leasehold units;

(3) The high prices commanded for leasehold units have encouraged the development of leasehold residential units and discouraged the development of fee simple units;

(4) The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) ranging from 400 per cent to 1000 per cent, for renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated, and these new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages;

(5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold and home, although the lease may yet have 25 or more years to run; and

(6) The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;

(7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rental was increased), causing lessees opting to

dispose of their leasehold interests to suffer severe economic losses.

(e) Residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

The legislature further finds and declares:

(1) That the land in Hawaii is to be considered as a source of life, dignity, and economic freedom for the men and women who reside on it;

(2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;

(3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

(4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that other applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

[Sections 2-6, omitted.]

APPENDIX J

HAW. SESS. LAWS 1975

ACT 185 H.B. NO. 55

A Bill for an Act Relating to the Hawaii Lease Rent Renegotiation Relief Act.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purposes.** The legislature reaffirms its findings and declaration contained in section 1, Act 307, Session Laws of Hawaii 1967, and further finds as follows:

The home is the basic source of shelter and security in society, the center of our society which provides the basis for the development of our future citizens. Deprivation through exorbitant and unreasonable prices of this basic need results in frustrations and unrest in our community that is harmful to the overall fiber of our society.

Although Act 307 was enacted in 1967 the fee simple ownership of residential lands in the State is still concentrated in the hands of a small number of landowners. The state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area within the State. On Oahu alone, 22 major private landowners own 72.5 percent of all land.

Along with this concentrated ownership of land there exists in the State of Hawaii a critical shortage of housing units for all income levels. There will be a need for over 250,000 low and middle income units by 1985 and a need will exist for all types of units. Since 1961 the economy has been producing an average of less than 10,000 low and middle income units annually. The economy has similarly lagged in the production of all other units, except the very high priced.

The small number of private landowners have continued to follow the policy of not selling their lands for residential use

but of leasing their lands under long term residential leases. While fee simple ownership still accounted for 68.9 percent of all owner-occupied housing on Oahu in 1972, leasehold residential development has dominated the housing market since 1967 as it had during the period 1950 to 1967. Between 1950 and 1966, 40 percent of all owner-occupied housing units developed on Oahu had been leasehold. Between 1967-1972, 46 percent of such development has been on leaseholds.

The foregoing developments have compelled thousands of people in the State to resort to leasehold residences to satisfy their housing needs, and this trend is likely to continue in view of the limited availability of land for residential purposes.

The predictions of Act 307 as to effects of the residential leasehold system have proven to be conservative. Today, there are over 26,000 outstanding residential leases, an increase of more than 10,000, since Act 307 was enacted. As stated in Act 307, the concentration of land ownership "is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical".

Initially, lease rents were low or were within the range which the public could afford. However, in the renegotiation of rents that have occurred in recent years, tremendous increases in lease rents have been imposed upon countless lessees by lessors. The compensation provided to be paid to lessors under Act 307 was directly related to the present value of the lease income stream generated under the lease to be condemned. Since June 24, 1967 lessors have generally adopted a practice of increasing lease rentals on renegotiations of existing leases in a manner unrelated to the raw land value, thereby greatly increasing the cost to the lessee when exercising his rights under Act 307 and resulting further in unconscionably increasing lease rents.

Renegotiation has brought about staggering increases in annual lease rentals. These increases have been the direct result of inflated land values which in turn have come about because of the supply of urban land for residential housing under the concentrated ownership described in the findings contained in Act 307. The effect of these increases has been to substantially

increase the cost of leasing housing for the people of Hawaii. The increases in lease rentals and premiums required prior to leasing of residential property has accentuated the problem stated in section 1(g) of Act 307 to the effect that the continuation of the residential leasehold system causes an artificial inflation in the price of fee simple residential property, as well as leasehold residential property.

Further, because of the unequal bargaining power between large landowners and individual lessees there have been breakdowns in the normal processes of bargaining and freedom of contract, resulting in unjust, unreasonable and oppressive lease rents being exacted by lessors. Thus the limited supply of housing units and concentrated ownership of such units have led to the exaction of exorbitant lease rents on renegotiation. In many instances, the lessor's terms are peremptorily submitted to the lessee in ultimatum form through letters rather than through any actual bargaining process.

This unequal bargaining relationship exists today despite the rights granted lessees under Part III of Act 307 which was passed some seven years ago. Accordingly the adverse and harmful effects sought to be alleviated by that Act have not been stemmed, but to the contrary have become more critical.

In addition the inequality of bargaining power due to the oligopolistic imbalance in land ownership has allowed the lessor to charge lease rents based not only on the raw land value of the property but also on improvements which have already been paid for by the lessee and on the value accruing thereon; thus the lessee is, in effect, paying the lessor for an investment made by the lessee. This is an unjust enrichment created by an oligopolistic market lacking competitive bargaining and is contrary to the public welfare.

Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed.

Residential leaseholds have had and continue to have undesirable economic effects. The high prices commanded for leasehold units have encouraged the development of leasehold

residential units and have discouraged the development of fee simple units. The increases in the price for both fee simple and leasehold residential lands have caused lease rentals to increase on renegotiation of rentals (on the expiration of 25 or 30 years of initial fixed rent periods) as much as 1000 percent; renegotiated lease rentals are invariably tied to the fee simple value of the land on which the leasehold residences are situated. These new lease rentals have at times exceeded the amount of the payments that the lessee had been making on the leasehold mortgages. Rental renegotiations have strongly favored the lessor, with the lessee having little option but to consent to such rental as determined by the lessor or to give up the leasehold, although the lease may yet have 25 or more years to run. The high increases in lease rentals have caused leasehold values to drop after the initial fixed rent period (e.g., a house appraised at $68,000 before renegotiation of lease rent has been appraised at $59,000 after the lease rental was increased), causing lessees opting to dispose of their leasehold interests to suffer severe economic losses.

Residential leaseholds have had undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase other housing. These situations have grave effects on the health, welfare and well-being of elderly persons and aggravate the already acute need for government-sponsored, low and middle income and elderly housing. With the increasing number of elderly in this State, the problem promises to become even more acute in the foreseeable future.

The legislature declares that it is the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms;

that the public health, safety and welfare of the people of Hawaii demand that legislation be enacted to prevent the imposition of confiscatory economic burdens upon the lessees of residential property; that pursuant to and based upon the findings stated above, the public health, safety, and welfare is severely and substantially affected and threatened, resulting in immediate, continuous, and irreparable harm and that all the conditions and circumstances set forth herein constitute a social emergency which it is the purpose of this act to prevent and remedy.

[Sections 2-5, omitted.]

APPENDIX K

HAW. SESS. LAWS 1975

ACT 186 S.B. NO. 1543

A Bill for an Act Relating to Residential Leaseholds and the Acquisition by the State Through Condemnation of Lands in Fee Simple and Disposition Thereof.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** Act 307, Session Laws of Hawaii 1967, now Chapter 516. Hawaii Revised Statutes, was intended to lessen the adverse consequences of the excessive concentration of the fee title to lands in Hawaii in the hands of a few owners by allowing residential leaseholders to acquire the fee simple title absloute or otherwise, to real property they were leasing.

The legislature finds that although the Act has been in full effect for nearly six years it has not been implemented. Many reasons have been cited for the failure to put the Act into effect including possible legal or constitutional difficulties inherent in the original Act.

The purpose of this Act is to reaffirm and reiterate the findings and declarations of necessity originally set forth in Act 307 and to amplify and clarify those findings and declarations of necessity.

SECTION 2. Chapter 516. Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read:

"**Sec. 516. Legislative findings and declaration of necessity; purpose.** (a) The legislature finds that:

(1) There is a concentration of land ownership in the State in the hands of a few landowners who have refused to sell the fee simple titles to their lands and who have

instead engaged in the practice of leasing their lands under long-term leases:

(2) The refusal of such landowners to sell the fee simple titles to their lands and the proliferation of such practice of leasing rather than selling land has resulted in a serious shortage of fee simple residential land and in an artificial inflation of residential land values in the State:

(3) Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land:

(4) The economy of the State and the public interest, health, welfare, security, and happiness of the people of the State are adversely affected by such shortage of fee simple residential land and artificial inflation of residential land values and by such deprivation of the people of the State of the choice to own or take a lease of the land on which their homes are situated and the required acceptance of such long-term leases of such lands:

(5) The acquisition of residential land in fee simple, absolute or otherwise, at fair and reasonable prices by people who are lessees under long-term leases of such land and on which such land their homes are situated and the ability of such people to fully enjoy such land through ownership of such land in fee simple will alleviate these conditions and promote the economy of the State and public interest, health, welfare, security, and happiness of the people of the State:

(6) The cost of living in Hawaii is and has been high. In recent years inflation has drastically increased the cost of

living in the State. The spiraling cost of living affects all people through erosion of the purchasing power of whatever monetary resources they command. For a growing proportion of Hawaii's population, quite possibly a majority, the high cost of living is denying them such basic necessities as sufficient nutritional intake, safe and healthy housing accommodations, clothing, and adequate preventive and curative health services. A substantive and significant contributing factor to the high and rising cost of living is the high cost of land whether leasehold or fee. Stabilizing the costs of land or, at least, slowing the artificial inflation of land values would curb the rising cost of living in Hawaii and, ultimately, contribute to the welfare of all people of the State by improving their standard of living:

(7) The Constitution of the State of Hawaii provides the State the power to provide assistance for persons unable to maintain a standard of living compatible with decency and health. The rising cost of land tied to other cost of living increases is swelling the ranks of those persons unable to maintain a decent and healthful standard of life. If the inflationary trend of land continues unchecked, the resultant inflationary total cost of living could create such a large population of persons deprived of decent and healthful standards of life that the consequent disruptions in lawful social behavior could irreparably rend the social fabric which now protectively covers the life and safety of all Hawaii's people. The threat posed by this possibility is sufficiently real and imminent to warrant State action to redistribute land as a means of curbing continuing inflationary rises in land values:

(8) The right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few:

(9) Land, in common with other natural resources, is of finite quantity: a fact particularly obvious in Hawaii.

In recent decades there has been growing general agreement that the wise conservation, preservation, use and management of exhaustible natural resources such as land are matters mandating an active governmental role. There is an intimate relationship between the monetary values accorded land in Hawaii and the stability and strength of the State's economy as a whole. Land values, artifically inflated by the high concentration of ownership, skew the State economy toward unnecessarily high levels. The pervasive and substantial contribution made to inflation by high land values creates a potential for economic instability and disruption. Economic inflation, instability and disruptions have real and potential damaging consequences for all members of an affected society. Checking inflation, improving the stability of the economy, and forestalling disadvantageous economic disruptions all are productive of general benefit to all members of the Hawaiian society. The sound and wise conservation, preservation, use and management of land cannot be separated from the subject of patterns of land ownership. To accomplish the public purposes of wisely conserving, preserving, using, and managing the land in the State requires changing present patterns of land ownership. Public laws, expenditures, programs, and policies which contribute to the realization of these public purposes serve a public use since they ultimately benefit the entire community. Changing present patterns of land ownership by allowing lessees under long-term leases of residential land to purchase in fee simple, absolute or otherwise, the land on which their homes are situated, through governmental intervention including exercise of the power of eminent domain to acquire fee simple title to such land and public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State, will help satisfy the pressing public necessity for a secure, strong and stable economy.

(10) The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii:

(11) Inflation lessens the quality of life of all members of this afflicted society and is particularly invidious in its impact on the 90 plus per cent of the population who are in the poverty, and low through middle income groups. The State has limited abilities to curb inflation and, perhaps, the only useful means available is the State's power to control land values. There is a pressing public necessity for the State to do whatever it can to curb inflation and to keep the cost of living at a level where it is possible and manageable to provide all citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this Act:

(12) The use of the power of eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose:

(13) Legislation providing to people who are lessees under long-term leases of residential land on which their homes are situated the ability to fully enjoy such land through ownership of such land in fee simple, absolute or otherwise, is for a public purpose.

(b) It is therefore declared to be necessary and it is the purpose of this chapter to alleviate the conditions found in subsection (a) of this section by providing for the right of any person who

is a lessee under a long-term lease of residential land in the State to purchase at a fair and reasonable price the fee simple title to such land, by providing for the condemnation of the fee simple title to such land and the payment of just compensation therefor by the State through the use of the power of eminent domain and by providing for the public financing of such purchase and such condemnation and payment through the issuance of bonds, the expenditure of general revenue funds, and the use of private funds which are at the disposal of the State."

[Sections 3-4, omitted.]

APPENDIX L

HAWAII REVISED STATUTES

CHAPTER 101

EMINENT DOMAIN

PART I. CONDEMNATION OF PRIVATE PROPERTY

SECTION

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PART 1. CONDEMNATION OF PRIVATE PROPERTY

§ 101-1 Definitions. In this part, except where the context otherwise requires:

(1) "County" means a county (except the county of Kalawao) and any agency of a county, including the board of water supply thereof, duly authorized to exercise the power of eminent domain.

(2) "Plaintiff" means the State or any county or the public utility or other authority duly authorized to exercise the power of eminent domain.

(3) "State" means the State or any agency of the State duly authorized to exercise the power of eminent domain. [L 1951, c 12, § 1(a); RL 1955, § 8-1]

§ 101-2 Taking private property for public use; disposal of excess property. Private property may be taken for public use. Private property may also be taken by the State or any county in excess of that needed for such public use in cases

where small remnants would otherwise be left or where other justifiable cause necessitates such taking to protect and preserve the contemplated improvement, or public policy demands such taking in connection with the improvement, in which case the condemning authority may sell or lease such excess property, with such restrictions as may be dictated by considerations of public policy in order to protect and preserve such improvements; provided, that in the disposal of any such excess property, if such property is less than the minimum lot size requirements of the applicable zoning regulations, is of a configuration or topography which in the judgement of the appropriate county zoning authority cannot be put to a reasonable use in accordance with the applicable zoning regulations, or lacks proper access to a street, it shall be offered to the owner or owners of the abutting land for a reasonable price based on an appraisal; provided further, that if such excess property conforms to said minimum lot size requirements, is of a configuration and topography which in the judgment of the appropriate county zoning authority can be put to a reasonable use in accordance with the applicable zoning regulations and has proper access to a street, then the State or the county, as the case may be, may sell such property at public auction. If there is more than one abutting owner who is interested in purchasing any such excess property which is less than the minimum lot size requirements of the applicable zoning regulations, is of a configuration or topography which in the judgment of the appropriate county zoning authority cannot be put to a reasonable use in accordance with applicable zoning regulations, or lacks proper access to a street, it shall be sold by the condemning authority by sealed bid to the abutting owner submitting the highest offer above the appraised value; provided further, that if any such excess property abuts more than one parcel, the condemning authority may make application for subdividing such property so that a portion thereof may be sold to each abutting owner at the appraised value if the public interest is best served by such subdivision and disposal. All moneys received from the sale or lease of such excess property shall be paid into the fund or appropriation

from which money was taken for the original condemnation and shall be available for the purposes of such fund or appropriation. [L 1896, c 45, § 1; am L 1909, c 10, § 1; RL 1925, § 808; am L 1925, c 59, § 1; RL 1935, § 50; am L 1941, c 149, § 1; RL 1945, § 301; am L 1945, c 185, § 1; am L 1951, c 12, § 1(b); RL 1955, § 8-2; HRS § 101-2; am L 1975, c 110, § 1; am L 1976, c 7, § 1]

§ 101-3 Entry upon private property by agreement. In the event the State or a county thereof enters upon privately owned real property by authority of an agreement to acquire the real property either by voluntary action of the parties or by condemnation, the State or county is required to:

(1) Reduce the agreement in writing;

(2) File the executed written agreement promptly in the bureau of conveyances;

(3) Complete its part of the agreement, including payment in full of any money, within the period of two years immediately succeeding the date upon which the agreement is filed.

If the State or county does not so complete its part of the agreement, the State or county shall pay to the property owner, in addition to the sum due, interest of six per cent a year on the sum due commencing with the end of the term of two years, and the property owner may bring suit against the State or any county to recover the sum together with interest. [L 1953, c 108, § 1; RL 1955, § 8-3]

§ 101-4 Right of eminent domain granted to public utilities and others. The right and power of eminent domain is hereby granted to every person, operating a public utility, and engaged in the transportation of passengers or freight or any commodity by rail or bus, or by any other means, or the conveyance or transmission of telephone messages, or the production, conveyance, transmission, delivery, or furnishing of electricity, power, water, gas, or oil, within the State, as well as to corporations designated in section 101-41. The right and power shall be exercised only in compliance with, and under, the

conditions and procedures set forth in this part. [L 1896, c 45, § 6; RL 1925, § 809; RL 1935, § 51; RL 1945, § 302; am L 1951, c 12, § 1(c); RL 1955, § 8-4]

§ 101-5 Fee simple or lesser estate may be acquired. In the taking of private property for a public use, a fee simple estate or any lesser estate may be acquired. [L 1896, c 45, § 2; RL 1925, § 810; RL 1935, § 52; RL 1945, § 303; am L 1951, c 12, § 1(d); RL 1955, § 8-5]

§ 101-6 What property may be taken. Property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature. [L 1896, c 45, § 3; am L 1898, c 62, § 1; RL 1925, § 811; RL 1935, § 53; RL 1945, § 304; am L 1951, c 12, § 1(e); RL 1955, § 8-6]

§ 101-7 Superior public use. Property already appropriated to some public use may be taken by the State or a county in the manner and under the conditions provided by part III. An easement over, across or under property not owned by the State or a county and devoted to public use may be taken by any other person enjoying the right of eminent domain where such taking will not substantially impair the use for which the property has previously been appropriated. [L 1951, c 12, § 1(f); RL 1955, § 8-7]

§ 101-8 Entering and surveying land. Any agent or servant of a plaintiff may, for the purpose of locating or surveying land to be condemned in accordance with this part, enter upon the land and make examinations and surveys. The entry shall not constitute a cause of action in favor of the owner of the land, except for damages resulting from wilful acts or negligence on the part of the agent or servant. [L 1896, c 45, § 7; am L 1917, c 108, § 1; RL 1925, § 812; RL 1935, § 54; RL 1945, § 305; am L 1951, c 12, § 1(g); RL 1955, § 8-8]

§ 101-9 Actions; priority. In all actions brought under this chapter, to enforce the right of eminent domain, all courts shall

give the actions preference over all other civil actions in the matter of setting the actions for hearing or trial, and in hearing them, to the end that all the actions shall be quickly heard and determined. [L 1959, c 18, § 1; Supp, § 8-8.5]

§ 101-10 Circuit courts have jurisdiction. The circuit courts shall try and determine all actions arising under this part, subject only to an appeal to the supreme court in accordance with law. The court may on its own motion or on motion of any party try and determine any issue in the case in advance of other issues. [L 1896, c 45, § 5; RL 1925, § 813; RL 1935, § 55; RL 1945, § 306; am L 1947, c 200, § 1(a); RL 1955, § 8-9]

§ 101-11 Procedure as in civil actions. Except as otherwise expressly provided in this part, the procedure shall be the same as in other civil actions. [L 1896, c 45, § 20; RL 1925, § 814; RL 1935, § 56; RL 1945, § 307; RL 1955, § 8-10]

§ 101-12 Evidence. In addition to rules of evidence otherwise provided by law, sections 246-40 and 246-46 shall apply to all proceedings brought under this part. [L 1963, c 143, § 4; Supp, § 8-10.1]

§ 101-13 Exercise of power by county. Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted as provided in section 101-14 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. The resolution, in the case of the city and county of Honolulu or an independent board thereof, shall after its introduction, be published in a daily newspaper with the ayes and noes, once (Sundays and legal holidays excepted) at least three days before final action upon it, and in the case of any other county or an independent board thereof, be published in a newspaper with the ayes and noes, at least one day (Sundays and legal holidays excepted), before final action upon it. [L

1919, c 63, § 1; am L 1923, c 48, § 1; RL 1925, § 815; am imp L 1933, c 98, § 2; RL 1935, § 57; RL 1945, § 308; am L 1951, c 12, § 1(h); RL 1955, § 8-11]

§ 101-14 Plaintiff. The attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property as provided for in this part. Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county for any of the purposes provided in this part which are within the powers granted to the county. [L 1896, c 45, § 4; am L 1917, c 108, § 2; RL 1925, § 816; RL 1935, c 58; RL 1945, § 309; am L 1947, c 200, § 1(b); am L 1951, c 12, § 1(i); RL 1955, § 8-12]

§ 101-15 Complaint; defendants. Actions under and by virtue of this part, shall be commenced by filing a complaint and issuing a summons thereon. All persons who are owners or claimants of the property sought to be condemned shall be joined as defendants. In case the owner or claimant is unknown to plaintiff, it shall be sufficient if the complaint includes a statement of that fact, and the defendant may be joined in the complaint under a fictitious name. In the event there is a class of persons owning or claiming some interest in the property sought to be condemned, who are too numerous to be served by personal service of the summons, or who would have to be ascertained by examination into the possible claims of a group of persons too numerous to permit identification of the defendants, the complaint may include a statement of that fact and the defendants may be joined in the complaint by describing them as a class, and in such case it shall be unnecessary to state in the complaint that the owners or claimants are unknown to the plaintiff. [L 1896, c 45, pt of § 8; RL 1935, pt of § 59; am L 1941, c 38, § 1; RL 1945, pt of § 310; RL 1955, § 8-13]

§ 101-16 Complaint; additional contents; map. The complaint shall also contain a statement of the use to which the land sought to be condemned is to be put, a description of each

and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map shall accompany the complaint which shall correctly delineate the land sought to be condemned and its location. [L 1896, c 45, pt of § 8; RL 1945, pt of § 310; RL 1955, §8-14]

§ 101-17 Different properties in one action. All property necessary for any public use may be united in one action. [L 1896, c 45, § 10; RL 1945, pt of § 310; RL 1955, § 8-15]

§ 101-18 Joint or consolidated actions by governmental agencies. Whenever two or more parcels of real property, or different interests in the same parcel of real property or improvements on real property or personal property in connection therewith, are to be acquired by eminent domain proceedings by two or more governmental agencies, and the properties to be so acquired are contiguous or are so interrelated that the taking of one of the properties or interests by one agency or the improvement contemplated in connection with the taking may affect the amount of the award which may be adjudged for the other of the properties, or vice versa, proceeding for the taking may be consolidated or the taking may be effected in one action brought in the name of one or more of the governmental agencies concerned in the taking pursuant to an agreement between the agencies. In such case the awards, when made, shall be apportioned in such manner as is agreed upon between the agencies, or, if not determined by agreement, that the apportionment shall be made by the court in such manner as it deems equitable, based upon the evidence given in the action or upon the same and such additional evidence as may be necessary or proper to determine the apportionment.

As used in this section, the term "governmental agency" includes the State, and any county, and any department, division, board, commission, public corporation, or other agency or instrumentality of the State or of any county.

Notwithstanding any other provision of law to the contrary, any governmental agency having by law the power to acquire any properties by the exercise of the power of eminent domain,

may enter into agreements with any other governmental agency to effect the consolidation or to join in one action for the acquisition of the properties as provided in this section. [L 1953, c 147, §§ 1-3; RL 1955, § 8-16]

§ 101-19 Amendments of complaints, citations. In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendments in form or substance in any complaint, citation, summons, process, answer, motion, order, verdict, judgment, or other proceeding, including amendment in the description of the lands sought to be condemned, whenever the amendment will not impair the substantial rights of any party in interest [L 1937, c 184, § 1; RL 1945, pt of § 310; RL 1955, § 8-17]

§ 101-20 Notice. When the owner or claimant of the land sought to be condemned is known, the summons shall be served by delivering to him, or to an agent authorized by appointment or by law to receive service of process, a certified copy thereof, together with a copy of the plaintiff's complaint. If the owner or claimant, although known, was never a resident of the State or has removed therefrom or cannot for any reason be served with process within the State, or if the owner or claimant is unknown, then the service of the summons upon the owner or claimant may be made in the manner provided by sections 634-23, 634-24, and 634-26. If the defendants are joined in the complaint by describing them as a class, then the service of the summons upon the defendants may be made by publication in a newspaper of general circulation in the county in which the property is situated, in the manner provided by sections 634-23(3) and 634-26, and by giving such further notice as the court may order. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case. [L 1896, c 45, § 9; RL 1925, § 818; RL 1935, § 60; am L 1937, c 184, § 2; am L 1941, c 38, § 2; RL 1945, § 311; RL 1955, § 8-18; am L 1959, c 19, § 1; HRS § 101-20; am L 1973, c 30, § 1]

§ 101-21 Intervenors. Any person in occupation of or having any claim or interest in any property sought to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to his own property or interest, in like manner as if named in the complaint. [L 1896, c 45, § 11; RL 1925, § 819; RL 1935, § 61; RL 1945, § 312; RL 1955, § 8-19]

§ 101-22 Decision. The court may determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the property. [L 1896, c 45, § 12; RL 1925, § 820; RL 1935, § 62; RL 1945, § 313; RL 1955 § 8-20]

§ 101-23 Damages assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed. If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, and also how much the portion not sought to be condemned will be specifically benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as compensation or damages. In case of the exercise of the power of eminent domain by the city and county of Honolulu in furtherance of any governmental power under section 70-111 and the improvement ordinance of the city, the amount of damages or compensation assessed, or

awarded, or agreed upon in any compromise approved by motion of the city council shall in no case be construed as limiting or affecting the power of the city council to distribute any portion of the cost upon any property found to be benefited thereby proportioned as provided by law in the exercise of their judgment whether under an improvement district or frontage improvement created before or after the acquisition of any such land. If condemnation is for the purpose of widening or realigning any existing highway or other public road, the owner of the property condemned shall be entitled to full compensation for the property actually taken and special benefits shall be considered only insofar as the value of the benefits shall not exceed the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff. That is, if the special benefits shall be equal to the severance damages, then the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the special benefits shall be less than the severance damages, then the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the land taken. [L 1896, c 45, § 13; am L 1919, c 63, § 2; RL 1925, § 821; RL 1935, § 63; RL 1945, § 314; am L 1947, c 200, § 1(c); am L 1953, c 269, § 1; RL 1955, § 8-21]

§ 101-24 Assessed as of day of summons. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of summons, and, except as provided in section 46-6, its actual value at that date shall be the measure of valuation of all property to be condemned, and the basis of damage to property by reason of its severance from the portion sought to be condemned, subject, however, to section 101-23.

No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages. [L 1896, c 45, § 15, pt of § 16; RL 1925, § 822; RL 1935, § 64; RL 1945, § 315; RL 1955, § 8-22; am L 1959, c 19, § 2]

§ 101-25 Payment of judgment, penalties. The plaintiff shall within two years after final judgment pay the amount assessed as compensation or damages and upon failure so to do all rights which may have been obtained by the judgment shall be lost to the plaintiff; and if such payment is delayed more than thirty days after final judgment, then interest shall be added at the rate of five per cent a year. The payment shall be made to the clerk of the court rendering the judgment. The plaintiff shall within thirty days after the payment deposit in the mails of the United States a written notice addressed to the defendants, who have filed answers or appeared in court in the proceedings, or to their attorneys of record in the proceedings, if so represented, at their last known address, that the payment has been made, and the clerk of the court shall distribute the payment to those entitled thereto in accordance with the order of the court. If the plaintiff fails to make the payment as aforesaid, the defendant shall be entitled to recover judgment as provided in section 101-27. If the plaintiff fails to give written notice of the payment as aforesaid, interest shall be added on the amount thereof at the rate of five per cent a year until the written notice is placed in the mails or until the defendant receives from the clerk of court the amount to which he is entitled under the terms of the order of court, whichever event shall first occur. [L 1896, c 45, § 17; RL 1925, § 823; RL 1935, § 65; am L 1937, c 184, § 3; am L 1941, c 55, § 1; RL 1945, § 316; am L 1951, c 12, § 1(j); RL 1955, § 8-23]

§ 101-26 Final order of condemnation. When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff. [L 1896, c 45, § 18; RL 1925, § 824; RL 1935, § 66; RL 1945, § 317; RL 1955, § 8-24]

§ 101-27 Defendant allowed damages upon abandonment or dismissal of proceedings. Whenever any proceedings instituted under this part are abandoned or discontinued before

reaching a final judgment, or if, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by him by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including his costs of court, a reasonable amount to cover attorney's fees paid by him in connection therewith, and other reasonable expenses; and the possession of the property concerned shall be restored to the defendant entitled thereto. Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury is demanded by either party, pursuant to the rules of court, within ten days from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use. In the event judgment is entered in favor of the defendant and against the plaintiff, any moneys which have been paid, and any additional security which has been furnished, by the plaintiff to the clerk of the court under sections 101-28 and 101-29, shall be applied or enforced toward the satisfaction of the judgment. In the case of the State or a county, if the moneys so paid to the clerk of the court are insufficient, then the balance of such judgment shall be paid from any moneys available or appropriated for the acquisition of the property concerned, or if that is insufficient then the same shall be paid from the general fund of the State or county, as the case may be. [L 1929, c 230, § 1; RL 1935, § 67; am L 1937, c 184, § 4; RL 1945, § 318; am L 1951, c 12, § 1(k); RL 1955, § 8-25; HRS § 101-27; am L 1973, c 30, § 2]

§ 101-28 Possession pending action; immediate occupation by plaintiff. At any time after the service of summons the court may, upon motion of the plaintiff and upon notice to the

defendant, issue an order putting the plaintiff in possession of the land sought to be condemned and permitting the plaintiff to do such work thereon as may be required for the purpose for which the taking of the land is sought. The motion shall contain a statement of the reasons for requiring an immediate occupation of the land sought to be condemned and a statement of the sum of money estimated by the plaintiff to be just compensation or damages for the taking of the land. Upon the filing of the motion the court shall issue an order directed to the defendants and returnable not more than twenty days from the date of the filing of the motion, requiring the defendants to appear and show cause why the motion should not be granted. The court may require proof by affidavit or otherwise of the right of the plaintiff to maintain the action and of the facts set forth in the motion and shall grant or deny the motion as the public interest and the rights of the parties may require.

Where the plaintiff is not the State or a county, the court may, upon motion of any defendant and good cause shown therefor, require the deposit with the clerk of the court, of such additional amount of money, or of a surety bond approved by the court in such additional amount, as the court deems necessary to reasonably secure the defendant in the collection of the final award which may be made thereafter, taking into consideration the adequacy of the initial estimate, the financial responsibility of the plaintiff and other pertinent circumstances. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(1); RL 1955, § 8-26]

101-29 Possession pending action; alternative procedure. Where the plaintiff is the State or any county, the following alternative procedure may be followed. At any time after the commencement of an action pursuant to this part, the State or any county may file a motion for an order of possession invoking this section and supported by an affidavit alleging, or by oral evidence prima facie showing:

(1) The right of the State or county to maintain the action;

(2) The public use for which the real property sought to be condemned is being taken; and

(3) The sum of money estimated by the State or county to be just compensation or damages for the taking of the real property.

Upon such motion and upon payment of such estimated sum of money to the clerk of the court for the use of the persons entitled thereto, the court shall issue an order ex parte putting the State or county in possession of the real property sought to be condemned and permitting the State or county to do such work thereon as may be required for the purpose for which the taking of the property is sought. The order placing the State or county in possession shall become effective upon the expiration of ten days after service thereof; provided that for good cause shown within ten days, the court may vacate or modify the order or postpone the effective date thereof for an additional period of time. Service of the order shall be made personally on those defendants who are in actual possession, and in other cases may be made by depositing a copy thereof in a United States post office, postage prepaid, registered mail addressed to the defendants at their last known addresses, or to their attorneys of record. [L 1951, c 12, pt of § 1(l); RL 1955, § 8-27]

§ 101-30 Order of possession. No order of possession shall issue unless the plaintiff has paid to the clerk of the court issuing the order, for the use of the persons entitled thereto, the amount of the estimated compensation or damages stated in the motion for the issuance of the order and, in the case of a plaintiff other than the State or a county, has so paid such additional amount, or furnished such additional security, as may be required by the court.

An order of possession issued under section 101-29 shall not become effective until (1) summons in the action has been served personally on the defendants within or without the State, as provided in section 101-20 or section 634-24, or (2) the first publication of the summons directed to the defendants

has occurred and notice has been posted as provided in section 634-23, or (3) the papers mailed to the defendants have been received as provided in section 634-24, or (4) the best notice practicable under the circumstances has been given as ordered by the court for good cause shown. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(l); RL 1955, § 8-28; HRS § 101-30; am L 1973, c 30, § 3]

§ 101-31 Payment of estimated compensation; effect thereof. Upon the application of the parties entitled thereto the court may order that the amount of the estimated compensation or damages stated in the motion and paid to the clerk of the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceedings. If an additional deposit of money has been paid to the clerk of the court pursuant to section 101-28 the amount of the additional deposit or of any portion thereof, shall not, without the consent of the plaintiff, be paid to the party. A payment to any party as aforesaid shall be held to constitute an abandonment by the party of all defenses interposed by him, excepting his claim for greater compensation or damages. If the compensation or damages finally awarded in respect of the land or any parcel thereof exceeds the amount of the money so received by any person entitled, the court shall enter judgment for the amount of the deficiency. The unexpended moneys and any additional security so deposited with the clerk of the court shall be available for, or for enforcement of, the payment of any final judgment awarded by the court. [L 1937, c 184, pt of § 5; RL 1945, § 319, pt of subs 1; am L 1947, c 200, pt of § 1(d); am L 1951, c 12, pt of § 1(l); RL 1955, § 8-29]

§ 101-32 Possession pending appeal. At any time after judgment has been rendered in the circuit court for or in favor of the plaintiff, or pending an appeal to the supreme court by either plaintiff or defendant, the plaintiff, if not already in possession of the land sought to be condemned under an order entered pursuant to sections 101-28 and 101-29, may be put into possession thereof upon the payment to the clerk of the

court of the amount assessed as compensation or damages and such further sum as may be required by the court as a fund to pay any further compensation or damages that may be awarded as well as all damages that may be sustained by the defendant if for any cause the property is not finally taken for public use. Upon such payment, the court shall make an order putting plaintiff into possession of the property sought to be condemned with the right to use the same during the pendency of and until the final conclusion of the litigation. If the plaintiff has appealed to the supreme court, the amount shall be held by the clerk until the entry of final judgment and the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order letting plaintiff into possession as aforesaid. If the defendant who is entitled to the amount of money assessed as compensation or damages and paid into court under this section has appealed to the supreme court, the defendant shall have the right to demand and receive payment of the same at any time thereafter, upon filing a receipt therefor and an abandonment of all defenses to the action or proceeding except as to the amount of compensation or damages that he may be entitled to if a new trial shall be granted. [L 1896, c 45, § 19; RL 1925, pt of § 825; RL 1935, pt of § 68; am L 1937, c 184, pt of § 5; RL 1945, § 319, subs 3; am L 1951, c 12, pt of § 1(l); RL 1955, § 8-30]

§ 101-33 Allowance of interest, etc. If an order is made letting the plaintiff into possession as provided for in sections 101-28, 101-29, and 101-32, the final judgment shall include, as part of the just compensation and damages awarded, interest at the rate provided in section 101-25 from the date of the order until paid by the plaintiff; provided, that except in the case of an appeal by the plaintiff as provided in section 101-32, interest shall not be allowed upon any sum paid by the plaintiff to the clerk of the court from the date of payment. The court may fix and include in the order or judgment the time within which and the terms upon which the parties in possession shall be required to surrender possession to the plaintiff. The court

may make such orders in respect of encumbrances, liens, rentals, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. [L 1896, c 45, pt of § 16; RL 1925, pt of § 825; RL 1935, pt of § 68; am L 1937, c 184, pt of § 5; RL 1945, § 319, subs 3; am L 1951, c 12, pt of § 1(l); RL 1955, § 8-31]

§ 101-34 Issue as to use may be set for immediate trial. If the defendant in his answer, or in return to the order to show cause, issued under section 101-28, denies that the use for which the property sought to be condemned is a public use, or a superior public use within the meaning of section 101-7, the issue may, upon the motion of any party, be set for immediate trial, without a jury and without regard to position on the calendar. Notwithstanding any provision of section 641-1, an interlocutory appeal shall lie from the decision on the issue as of right, and the appeal shall be given precedence in the supreme court. Failure of the defendant to raise the issue within ten days after service of an order granting immediate possession shall be deemed an admission that the use is a public use or a superior public use, as the case may be. [L 1951, c 12, pt of § 1(l); RL 1955, § 8-32; HRS § 101-34; am L 1973, c 30, § 4]

§ 101-35 Tax official as party; certificates, etc. Whenever an eminent domain proceeding is brought by the State or any county for the purpose of acquiring the fee simple estate in real property neither the director of taxation, or any other tax official shall be joined as party respondent merely on account of any lien for real property taxes. The director may intervene in the proceeding as provided by section 101-21. Upon filing the complaint the plaintiff shall furnish a copy thereof to the director and shall also furnish him a copy of any amended complaint. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-33; am L Sp 1959 2d, c 1, § 16]

101-36 Certificate of deposit of moneys in court, notice of lien. If any moneys are paid into court by the plaintiff in the course of an eminent domain proceeding, the plaintiff or its

attorney shall certify the fact of the payment to the director of taxation and shall further certify the date when possession of the land on account of which the payment was made was acquired by the plaintiff, or in the event of entry of a final order of condemnation without previous possession of the land, shall certify the date of the final order of condemnation. A copy of the certificate shall be filed as part of the record in the case. In the event of a final determination granting the application of any party for the payment to him of any of the moneys so paid into court, or if a final order of condemnation is entered then immediately upon receipt of the certificate, the director shall certify to the clerk of the court in which the eminent domain proceeding is pending the amount of real property taxes, penalties and interest constituting a lien upon the land so coming into the possession of the plaintiff, or constituting a lien upon the land which was the subject of the final order of condemnation, as the case may be, and in computing the amount of the lien the director shall cause the taxes due on the parcel of land or portion of a parcel of land so coming into the possession of the plaintiff or made the subject of the final order of condemnation, to be remitted for the balance of the taxation period or year from and after the date of possession or, in the event of entry of a final order of condemnation without previous possession by the plaintiff, from and after the date on which the final order of condemnation was entered, as the case may be. The director or other tax official may remit the taxes in the manner provided by this section upon the receipt of the certificate. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-34; am L Sp 1959 2d, c 1, § 16]

§ 101-37 Payment of taxes out of deposit. The amount of the taxes, penalties, and interest so certified shall be paid to the tax official making the certificate by the clerk of the court from the moneys paid into court, and no clerk shall distribute any moneys so paid into court without the consent of the director of taxation, unless the certificate has been furnished. The clerk shall apportion the tax lien among the parties entitled

to receive the moneys so paid into court in accordance with the direction of the court. Any of the parties may petition the court for determination of the correct amount of taxes, making the director a party to the proceeding. Upon the conclusion of the proceeding the director shall make a new certificate in accordance with the final decision upon the matter, and showing additional penalties and interest, if any. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-35; am L Sp 1959 2d, c 1, § 16]

§ 101-38 Further certificate of possession. In the event possession of any land which is the subject of eminent domain proceedings commenced for the acquisition of the fee simple estate in such lands is obtained by the State or any county, whether or not any moneys are paid into court at the time, the plaintiff or its attorney upon the request of any interested person shall certify the date of the possession to the director of taxation, and upon receipt of the certificate the director, or tax collector and other tax official may remit the taxes in the manner provided in section 101-36. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-36; am L Sp 1959 2d, c 1, § 16]

§ 101-39 Effect of abandonment of eminent domain proceedings. If (1) possession is abandoned at any time prior to the entry of final order of condemnation, or (2) proceedings are abandoned or discontinued before reaching final judgment, or (3) the final judgment does not provide for the taking of the land for public use, or (4) the final order of condemnation is not entered within two years after final judgment, then:

(A) The amount of taxes remitted for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be restored to the tax lists and tax rolls and shall be deemed delinquent if not paid within ten days after the mailing of notice and demand for payment; and

(B) If the property has not been assessed for taxes in any year by reason of such possession by the plaintiff the

property shall be assessed for taxes in the manner provided for property omitted from taxation, and the taxes due on the property for the balance of the taxation period or year from and after the event enumerated in items (1), (2), (3), or (4) above shall be placed on the tax lists and tax rolls and collected as in the case of property omitted from taxation. [L 1939, c 211, pt of § 3; RL 1945, pt of § 320; RL 1955, § 8-37]

[Parts II-IV, omitted.]

Nos. 83-141, 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Appeal No. 83-141 Docketed July 28, 1983;
Appeal No. 83-283 Docketed August 16, 1983.

Probable Jurisdiction Noted and Cases Consolidated October 31, 1983.

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Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

No. 79-0096

MIDKIFF, FRANK E., RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

—v.—

TOM, PAUL A., TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY AS-

SOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

Intervenors.

DATE	*NR.*	*PROCEEDINGS*
1979		
Feb 28	1	VERIFIED COMPLAINT—EXHIBITS "A", "B" and "C" AND SUMMONS Summons issued
	2	Motion for Preliminary Injunction—Memorandum in Support of Motion for Preliminary Injunction—Affidavit of William Van Allen—Affidavit of Alfred J. Dow, Jr.—Notice of Motion—3-10-79 @ 10 am, Judge King
	3	Motion for Temporary Restraining Order—Memorandum in Support of Motion for Temporary Restraining Order—Affidavit of Matsuo Takabuki—Attorney's Certificate
	4	Temporary Restraining Order—defts restrained from taking any further action with respect to Pltfs' residential property purs. HRS Chapter 516 until M/PI heard—M/PI 3-10-79 @ 10 am, Judge King—Pltfs to post $100.00 security bond—TRO to expire 3-10-79 *KING*
		EO: M/TRO GRANTED—M/PI set for 3-10-79 @ 10 am—bond set @ $100.00 *KING*

DATE	NR.	PROCEEDINGS
Mar 2	5	Stipulation Extending Time—M/PI reset from 3-10-79 to 3-14-79 @ 9 am TRO reset from 3-10-79 to 3-14-79 *KING*
5	6	Return of Service—served Lawrence N. C. Ing 3-1-79
	7	Return of Service—served Tony Taniguchi 3-2-79
	8	Return of Service—served Franklin Y. K. Sun 3-1-79; Hawaii Housing Authority thru Asst. Dir. Wm. Hall 2-28-79; Paul A. Tom 3-2-79; Andrew I. T. Chang 3-1-79; Wayne T. Takahashi 3-1-79; Wilbert K. Eguchi 3-1-79; David C. Slipher 3-2-79
7	9	Motion to Intervene—Memorandum in Support of Motion to Intervene—Affidavit of John Francis Perkin—Exhibit "A"—Notice of Motion—Certificate of Service—3-14-79 @ 10 am, Judge King
8	10	Motion to Intervene as Defendants; Memorandum in Support of Motion to Intervene as Defendants; Exhibit 1; Affidavits of Franklin Y.K. Sunn and James H. Case; Exhibits A, B and C; Notice of Motion—3-14-79 @ 10 am, Judge King; Certificate of Service
9	11	Stipulation Extending Time; Order—M/PI from 3-14-79 to 4-24-79 @ 9 am *KING*
	12	Defendants' Memorandum in Support of Motion to Intervene; Affidavit of R. Brian Tsujimura
12	13	Defendants' Memorandum in Support of Motion to Intervenue; Affidavit of R. Brian Tsujimura; Affidavit of Maurice S. Kato

DATE	NR.	PROCEEDINGS
	14	Motion to Intervene as Defendants; Affidavit; Notice of Motion—3-14-79 @ 10 am, Judge King; Certificate of Service
13	15	Memorandum in Opposition to Motion to Intervene; Certificate of Service
14		*EP*: M/Intervene as Defts GRANTED—PT conf. set for 3-20-79 @ 2 pm (YI) *KING*
16	16	Return of Service—served Nobuyoshi Tamura—3-3-79
19		*EO*: PT conf. moved up to 3-20-79 @ 9:30 am *KING*
20		*EP*: PT—Motion by intervenors Kahala Community Assoc. to modify TRO GRANTED—M/Dissolve TRO set for 3-27-79 @ 11 am—Discussion re: Defts' proposed PT order (YI) *KING*
	17	Motion to Dissolve Temporary Restraining Order, or, in the Alternative for the Giving of Security; Memorandum in Support of Motion to Dissolve Temporary Restraining Order, Or, in the Alternative for the Giving of Security; Affidavit of Don R. Cowell; Notice of Motion—3-27-79 @ 11 am, Judge King; Certificate of Service
	18	Motion to Modify Temporary Restraining Order; Memorandum in Support of Motion to Modify Temporary Restraining Order; Exhibit A; Notice of Motion—3-20-79 @ 9:30
	19	Proposed Pre-Trial Order
	20	Answer to Complaint (HHA & Sunn)

DATE	*NR.*	*PROCEEDINGS*
	21	Plaintiffs' First Request for Production of Documents; Certificate of Service
22	22	Request for Production of Documents to Plaintiffs; Certificate of Service
	23	Request for Admissions; Certificate of Service
	24	Interrogatories to Plaintiffs; Certificate of Service
23	25	Answer of Intervening Defendants
	26	Defendant Intervenors' First Set of Interrogatories, Rule 34 Requests for Production, and Rule 36 Requests for Admissions to Plaintiffs; Certificate of Service
23	27	Order Granting Motions to Intervene
26	28	Interrogatories to Defendants
	29	Plaintiffs' Second Request for Production of Documents
	30	Memorandum in Opposition to Motion to Dissolve Temporary Restraining Order
	31	Supplementary Memorandum in Support of Motion to Dissolve Temporary Restraining Order
27	32	Order Modifying Temporary Restraining Order *KING*
	33	Proposed Pre-Trial Order
	34	Corrected Defendant Intervenors' First Set of Interrogatories, Rule 34 Requests for Production, and Rule 36 Requests for Admissions to Plaintiffs

DATE	NR.	PROCEEDINGS
	35	Answer to Complaint (Intervenors); Certificate of Service
		EP M/Dissolve TRO or for Bond DENIED (YI) *KING*
28	36	Defendant-Intervenor's Answer to Complaint; Certificate of Service
	37	Defendant-Intervenor's First Request for Production of Documents Propounded to Plaintiffs; Certificate of Service
Apr 2	38	Stipulation Re Application of 28 U.S.C. § 455; Certificate of Service
6	39	Motion to Take Judicial Notice; Exhibit "A"; Notice of Motion—4-24-79 @ 10 am, Judge King
	40	Notice of Taking Deposition
9	41	Notice of Taking Deposition
	42	Certificate of Service
10	43	Notice of Taking Depositions Upon Oral Examination
11	44	Return on service—served Agnes Conrad—4-10-79
	45	Notice of Taking Depositions Upon Oral Examination
	46	Notice of Taking Depositions Upon Oral Examination
	47	Notice of Taking Deposition
	48	Notice of Taking Deposition
	49	Return on serv—served William Cook—4-9-79

DATE	NR.	PROCEEDINGS
	50	Return on serv—served Ike Odachi—4-9-79
	51	Return on serv—served Harlin Young—4-9-79
	52	Return on serv—served James Halstrom—4-9-79
12	53	Notice of Taking Deposition Upon Oral Examination
	54	Notice of Taking Deposition Upon Oral Examination
	55	Notice of Taking Deposition Upon Oral Examination
	56	Amended Notice of Taking Deposition Upon Oral Examination
	57	Notice of Taking Deposition
	58	Notice of Taking Deposition
	59	Notice of Taking Deposition
	60	Notice of Taking Deposition
	61	Notice of Taking Deposition
	62	Return on Subpoena—served Wayne Minami
	63	Objection to Subpoena and Certificate of Service
	64	Objection and Certificate of Service
	65	Notice of Taking Deposition Upon Oral Examination; Certificate of Service
	66	Motion for Order to Compel Discovery; Memorandum in Support of Motion; Exhibits A and B; Affidavit of Clinton R. Ashford; Notice of Motion and Certificate of Service—4-13-79 @ 9 am, Magis Young

DATE	NR.	PROCEEDINGS
	67	Ex Parte Motion for Order Shortening Time; Exhibit A and Affidavit of Clinton R. Ashford
	68	Ex Parte Order Shortening Time *YOUNG*
13	69	Memorandum in Opposition to Motion to Compel; Exhibits "A" and "B"; Affidavit of R. Brian Tsujimura; Exhibit A & B; Certificate of Service
13		*EP*: M/Compel—taken under advisement (TC) *YOUNG*
16	70	Return on Subpoena—served Tan Tek Lum
	71	Return on Subpoena—served Gilbert Root
	72	Return on Subpoena—served Alfred J. Dow, Jr.
	73	Return on Subpoena—served George Loomis of Bishop Est.—4-12-79
	74	Return on Subpoena—served Alfred Dow of Bishop Est.
	75	Return on Subpoena—served Matsuo Takabuki of Bishop Est.
	76	Return on Subpoena—served Myron Thompson of Bishop Est.
	77	Return on Subpoena—served William Van Allen of Bishop Est.
17	78	Objection to Subpoena; Exhibit A; Certificate of Service
	79	Return on Subpoena—served Don R. Cowell—4-12-79
	80	Return on Subpoena—served Raymond Lesher—4-12-79

DATE	NR.	PROCEEDINGS
	81	Return on Subpoena—served John J. Hulten—4-12-79
	82	Notice of Taking Deposition
	83	Notice of Taking Deposition
	84	Answers to Request for Admissions of Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund; Certificate of Service
	85	Answers to Interogatories of Defendants-Lessees Wai-Kahala Tract "H" Association, Inc., et al.; Certificate of Service
	86	Answers to Interrogatories of Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund; Certificate of Service
18	87	Return on Subpoena—served Aileen Anderson—4-17-79
	88	Motion to Compel Discovery and Impose Sanctions; Affidavits of James H. Case, James W. Boyle and Sue Lin Chong; Memorandum of Points and Authorities in Support of Motion to Compel Discovery and Impose Sanctions; Notice of Motion; Exhibits A through N—4-19-79 @ 9:30 am, Magis Young
19	89	Notice of Taking Deposition
	90	Notice of Taking Deposition
	91	Return on Subpoena—served Richard Sasaki

DATE	NR.	PROCEEDINGS
	92	Return on Subpoena—served Walter Loo
	93	Memorandum in Support of Motion for Order Compelling Discovery; Exhibit "A"; Certificate of Service
	94	Motion to Compel Production of Documents; Affidavit of William E. Atwater; Memorandum of Points and Authorities in Support of Motion to Compel Production of Documents; Notice of Motion; Exhibits A Through D—4-23-79 @ 11:30 am, Judge King
	95	Answers to Interrogatories (of Hawaii Housing Authority)
	96	State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and Certificate of Service
	97	Order Denying Plaintiffs' Motion to Compel Discovery—cc: Ashford, Morry, Naito, O'Connor, Case, Watts *YOUNG*
20	98	Ex Parte Motion for Order Shortening Time; Exhibit "A"; Affidavit of William E. Atwater; Order Granting Ex Parte Motion to Shorten Time for Hearing on Motion to Compel Discovery and Impose Sanctions; Certificate of Service—4-23-79 @ 11:30 am, Judge Byrne *BYRNE*
		Joint Deposition of Don R. Cowell and William Dornbush w/ exhibits—4-17-79
		Deposition of John Hulten—4-18-79
		Deposition of Eileen Anderson—4-18-79
		Deposition of Raymond A. Lesher—4-18-79

DATE	NR.	PROCEEDINGS
		Deposition of Sidney William Cook—4-11-79
		Deposition of Walter W.L. Loo—4-18-79
	99	Appeal of Magistrate's Order Denying Plaintiffs' Motion to Compel Discovery
	100	Memorandum in Opposition to Motion to Compel; Affidavit of G. Richard Mowry; Affidavit of Richard Sasaki; Cert. of Serv.
	101	Memorandum in Opposition to Motion for Preliminary Injunction; Exhibits A-D
	102	Certificate of Service
	103	Response to Plaintiffs' First and Second Request for Production of Documents
	104	Motion in Limine; Memorandum of Points and Authorities and Notice of Motion—4-24-79 @ 10 am, Judge King
	105	Answers to Interrogatories
	106	Answers to Interrogatories
	107	Response of Defendant-Intervenors to Plaintiffs' Second Request for Production of Documents; Cert. of Serv.
23	108	Memorandum in Opposition to Motion for Preliminary Injunction; Certificate of Service
		Transcript of Proceedings—4-13-79—copy—(TC)
	109	Supplement to Motion to Compel Discovery

DATE	NR.	PROCEEDINGS
	110	Memorandum in Opposition to Motion in Limine Filed by Defendant-Intervenors Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund
		Deposition of Richard S. Sasaki
		Deposition of Alfred J. Dow
		Deposition of Gilbert W. Root
		Deposition of Tan Tek Lum
		Deposition of Myron B. Thompson
		Deposition of George Loomis
		Deposition of James E. Hallstrom, Jr.
		Deposition of William Van Allen
		Deposition of Matsuo Takabuki
	111	Corrected and Supplemental Answers to Interrogatories to Defendants From Plaintiffs Dated March 26, 1979; Certificate of Service
	112	Reply Memorandum in Support of Motion for Preliminary Injunction; Cert. of Serv.
	113	Plaintiffs' Reply Memorandum on the Doctrine of Abstention; Cert. of Serv.
		EP: M/Compel—discussion re the issues to be tried in the M/PI hrng.—case to be pretried on 4-24-79 @ 10 am,—Hrng. on M/PI to follow (YI) *KING*
24		*EP*: M/PI and PT—Pltfs' exh. P-1 thru P-28 & P-86 & P87 admitted—Defts' exh. D-207 & D-209 admitted—William G. Van Alan, Kazuo Kohatsu CST—hrng. cont'd to 4-25-79 @ 9:30 am (DO) *KING*

DATE	NR.	PROCEEDINGS
	114	Defendant/Intervenor Halawa Valley Estates Fee Conversion Corporation's Answers to Interrogatories; Cert. of Serv.
	115	The Determination by the Legislature That A Taking is For a Public Purpose is Entitled to Great Deference
	116	The Presumption of Validity and Plaintiff's Burden of Proof
25		Deposition of Fred E. Case
		EP: Cont'd M/PI—Pltfs' exh. P-88 admitted—Defts' exh. D-104,105 & 222 admitted—Fred E. Case and Charles Ackerson CST—hrng cont'd to 4-26-79 @ 9 am (DO) *KING*
	117	Stipulation of Documentary Evidence; Order *KING*
		Deposition of Charles B. Akerson
	118	Stipulation of Documentary Evidence *KING*
26		Partial Transcript of Proceedings—4-24-79—copy (DO)
		EP: M/PI—Pltf's exh. P-29, P-31, P-33, P-36, P-40 thru P-63, and P-65 thru P-84—Deft's exh. D-100, D-106, D-107, D-200 thru D-206, D-11, D-12, D-15, D-17 and D-18—Mr. Kohatsu recalled—Plft rested—Raymond Lesher CST—Deft Waialae-Kahala Tract H Assoc. Inc., et al. rested—John Hulton CST—Deft K.C.A. rested—Pltf rested—hrng cont'd to 4-27-79 @ 9:30 am (DO) *KING*
27		*EP*: M/PI—taken under advisement—arguments heard by all parties (DO) *KING*

DATE	NR.	PROCEEDINGS
	119	Supplemental Trial Memorandum
May 1	120	Retn. on service—served Yoshi Yanagawa—4-18-79
	121	Retn. on service—served Franklin Y.K. Sunn—4-18-79
	122	Retn. on service—served Kazuo Kohatsu—4-20-79
3		Deposition of Ike Odachi
		Deposition of Harlin S.K.Y. Young
8	123	Decision on Motion for Preliminary Injunction—GRANTED *KING*
		cc: Ashford, Morry, O'Connor, AG off., Case, Watts
16	124	First Stipulation to Extend Time for Agreement on Form of Preliminary Injunction; Order—5-21-79 *KING*
Jun 8	125	Preliminary Injunction—Deft HHA enjoined from effectuating order to pltfs to commence arbitration, ordering any mandatory arbitration, or confining the method to be used for determining "owner's basis to the tow methods set forth in Section 516-1(A) and (B), HRS—provided that pltfs first give security in the sum of $10,000 for the payment of such costs and damages as may be incurred or suffered by any party who is found wrongfully enjoined when final decision reached—Provision for negotiations under HRS 516,Part IIA and out HRS 516, Part IIA, specifically designation and commencement of condemnation proceedings are not enjoined under this Prel. Inj. *KING*

DATE	NR.	PROCEEDINGS
15	126	Order to Deposit Money in an Interest Bearing Account *KING*
22	127	Notice of Pretrial Conference—7-6-79 @ 3 pm, Judge King
Jul 6		Partial Transcript of Proceedings—4-24-79—copy (DO)
		EO: Preliminary Pre-trial—Court ordered that the following timetable be followed: All motions to be filed by 8-3-79—Memos in Opp. to Motions be filed by 9-4-79—Reply memos be filed by 9-10-79—Arguments on motions and pretrial set for 9-17-79 @ 3 pm—Trial set for 12-4-79 @ 9 am—Mr. Watts will prepare order memorializing PT *KING*
Aug 3	128	Memorandum on the Extent of Judicial Inquiry into Legislative Findings and Certificate of Service
	129	Motion for Order Declaring Certain Facts Re Taken as True or Admitted for Purposes of This Proceeding; Memorandum of Law; Notice of Motion—9-17-79 @ 3 pm, Judge King
	130	Memorandum Concerning Scope of Review of Legislative Findings Supporting Chapter 516
15	131	Withdrawal and Substitution of Counsel—Hoddick, Reinwald, O'Connor & Marreck w/draws & Stubenberg, Shigemura, Roney & Gniffke appear *KING*
22	132	Certificate of Service *EO*: Conf.—trial set for 4-29-80 @ 9:30 am—further conf. 9-4-79 @ 3 pm *KING*

DATE	*NR.*	*PROCEEDINGS*
24		Transcript of Proceedings—4-24-79—copy (DO)—Vol. I Transcript of Proceedings—4-24-79—copy (DO)—Vol. II
Sep 4		*EP*: PT—M/SJ re: legislative findings ordered filed by 9-18-79—response by 10-15-79—reply by 10-29-79—hrng on motion 11-14-79 @ 9 pm—hrng previously set for 9-17-79 contd to 11-14-79 @ 2 pm (TC) *KING*
12	133	Notice of Taking Depositions Upon Oral Examination
18	134	Motion for Partial Summary Judgment; Memorandum in Support of Motion for Partial Summary Judgment; Exhibit; Affidavit of I. Nelson Rose; Affidavit of John Hulten; Notice of Motion; Certificate of Service—11-14-79 @ 2 pm, Judge King
21	135	Retn on serv—served Mike McElroy
27	136	Motion for Partial Summary Judgment; Memorandum in Support of Motion for Partial Summary Judgment; Notice of Motion; Certificate of Service—11-14-79 @ 2 pm, Judge King
Oct 2	137	Joinder in Motion for Partial Summary Judgment
15	138	Memorandum in Opposition to Motion for Order Declaring Certain Facts to Be Taken as True
	139	Trustees' Memorandum Regarding the Court's Scope of Review of Legislative Findings

DATE	NR.	PROCEEDINGS
	140	Memorandum in Opposition to Motions for Summary Judgment; Affidavits of Matsuo Takabuki and Rosemary Fazio
19	141	Joinder in Intervenors' Motions for Partial Summary Judgment and Memoranda in Support of Motions
24	142	Joinder in Motions for Partial Summary Judgment
29	143	Memorandum of Portlock Community Association, et al. in Response to Trustees Memorandum Regarding Scope of Review of Legislative Findings—Certificate of Service
	144	Response of Portlock Community Association; Kokohead Community Lease-Fee Inc.; Hahaione Valley Community Association Inc. to Trustees—Memorandum in Opposition to Motions for Summary Judgment—Certificate of Service
	145	Supplemental Memorandum in Support of Defendant-Intervenors' Motion for Partial Summary Judgment; Certificate of Service
	146	State Defendants' Reply Memorandum to Plaintiffs' Memorandum Regarding Court's Scope of Review of Legislative Findings
	147	Reply Memorandum Re Motion for Order Declaring Certain Facts to be Taken as True
Nov 14		*EP*: M/SJ—Taken under advisement. (YI) *KING*
26	148	Motion to Compel Discovery and Impose Sanctions; Memorandum in Support of Motion; Exhibits "A" and "B"; Affidavit of Rosemary T. Fazio; Notice of Motion—12-5-79 @ 3, Magis. Young

DATE	*NR.*	*PROCEEDINGS*
		Partial Transcript of Proceedings—11-14-79—copy (YI)
Dec 5		Deposition of Michael M. McElroy
10	149	Stipulation to Continue Plaintiffs' Motion to Compel Discovery and Impose Sanctions—from 12-5-79 to 12-17-79 @ 9 am, Magis. Young *KING*
13	150	Memorandum Decision—Defts entitled to summary judgmnet—It is not up to the Court to decide whether that Chapter 516 is legal but up to the Legislature that enacted it—cc: Ashford, Morry, Nakashima, Stubenberg, Tsujimura, Case, Watts (Defts. to prepare order) *KING*
18	151	Amended Notice of Motion
19	152	Amended Memorandum Decision—cc: Ashton, Morry, Nakashima, Stubenberg, Tsujimura, Case, Watts *KING*
1980		
Jan 4	153	Memorandum in Opposition to Motion to Compel Discovery
17		Transcript of Proceedings—9-4-79—orig. (TC)
22		Transcript of Proceedings—11-14-79—orig. (YI)
		Transcript of Proceedings—4-23-79—orig. (YI)
		Transcript of Proceedings—3-27-79—orig. (YI)
		Transcript of Proceedings—3-20-79—orig. (YI)

DATE	NR.	PROCEEDINGS
		Transcript of Proceedings—3-14-79—orig. (YI)
Feb 11		*EO*: Conference—discussion re clarification of Court's Order *KING*
19	154	Motion for Partial Summary Judgment, Dismissal of Claims and Entry of Final Judgment; Memorandum in Support of Motion; Notice of Motion—3-27-80 @ 9 am Judge King
25	155	Amended Notice of Motion—M/PSJ; Dismissal of Claims & Entry of Final Judgment—April 3, 1980 @ 9:00 am, Judge King
Mar 11	156	Joinder in Motion for Partial Summary Judgment
27	157	Joinder in Motion for Partial Summary Judgment—State defts.
28	158	Memorandum in Opposition to Motion for Partial Summary Judgment
31	159	Joinder in Motion for Partial Summary Judgment
Apr 1	160	Supplemental Memorandum in Support of Motion for Partial Summary Judgment
3		*EP*: M/PSJ GRANTED with exception (TC) *KING*
9		Transcript of Proceedings—4-3-80 (TC)—Copy
May 7	161	Stipulation for Withdrawal as Interventor by Alii Shores Community Association *KING*

DATE	NR.	PROCEEDINGS
Jun 10	162	FINAL JUDGMENT and PERMANENT INJUNCTION—Mandatory arbitration of HRS Chapter 516, Part IIA and HRS § 516-1(14) are unconstitutional—HHA personnel permanently restrained and enjoined from effectuating statutes in regard to any development tract of leasehold residential lots; effecting compensation to be paid as set forth in statutes—$10,100 posted for TRO to be returned to pltfs—HRS § 516-24, § 516-26 and §§ 516-61 through 516-70 are not ripe for review, and therefore are DISMISSED w/o prej.—Pltfs' claims premised on Article 3 of Hawn. Admiss. Act are nonjusticiable and accordingly DISMISSED w/prej.—Pending motions' issues not ripe for adjudication—All other issues raised by the Complaint and not disposed of by this jdgmt is GRANTED in favor of defts and deft-intervenors, and against pltfs—all parties shall bear own costs (copy given to financial deputy) *KING*
		cc: Ashford, Morry, Stubenberg, Tsujimura, Case, Watts
Jul 3	163	Stipulation for Partial Withdrawal as Intervenor by Kahala Community Association, Inc. and Kahala Community Association Fee Purchase Fund *KING*
9	164	Stipulation for Withdrawal As Intervenor By Wai-Kahala Tract "H" Association, Inc. *KING*
	165	Notice of Appeal—(By Plaintiffs) Notice mailed to Stubenberg/Lawhn, Tsujimura/Kawada, Case/Bays, Watts & Clerk, 9th CCA; Docket Fee Pymt. Notif. Form & Docket Entries mailed to Clerk, 9th CCA; Notice also mailed to O'Connor & Naito

DATE	*NR.*	*PROCEEDINGS*
21	166	Designation of Reporters' Transcripts Certificate of Record mailed to Clerk, 9th CCA; Certificate of Record, Copy of Docket Entries and Designation of Clerk's Record form mailed to Stubenberg/Lawhn, Tsujimura/Kawada, Case/Bays & Watts. Also mailed to O'Connor & Naito.
30	167	Cross-Designation of Reporter's Transcript—Appellee Halawa Valley Estates Fee Conversion Corp.
31	168	Cross-Designation of Trial Clerk's Record—State Defendants
Aug 4	169	Cross-Designation of Trial Clerk's Record—Kahala Community Association, Inc. & Kahala Community Association Fee Purchase Fund
7	170	Cross-Designation of Reporter's Transcript—Portlock Community Assoc. (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Assoc.; Hahaione Valley Community Assoc., Inc.
Oct 21	171	Designation of Clerk's Record on Appeal—Appellant
1981		
Feb 23	172	Designation of Clerk's Record on Appeal—Appellee (Kahala Community Association, Inc. & Kahala Community Fee Purchase Fund)
	173	Defendants' Designation of Clerk's Record on Appeal (State)
27	174	Plaintiffs' Counter-Designation of Clerk's Record on Appeal

DATE	*NR.*	*PROCEEDINGS*
Mar 18		Record on Appeal Airmailed to Clerk, 9th CCA
Apr 13	175	Stipulation for Partial Withdrawal as Intervenor by Kahala Community Association, Inc., and Kahala Community Association Fee Purchase Fund *KING*
1983		
Jun 24	176	Amended Final Judgment and Permanent Injunction (PROPOSED)
	177	Statement of Objections to Plaintiff's Proposed Amended Final Judgment and Permanent Injunction
30	178	JUDGMENT—9th CCA—judgement of DC is hereby Reversed and Remanded—cc: Ashford; Morry; Stubenberg; Lilly, DAG; Case; Watts; David before *ALARCON, POOLE and FERGUSON*
Jul 1		*EO*: Status Conference set for 7-6-83 @ 9:30 am—Notified: Clinton Ashford, Esq. G. Richard Morry, Esq., Dennis E.W. O'Connor, Esq., Corey Park; Michael Lilly; Thomas Watts, A. Bernard Bays
6	179	Withdrawal and Substitution of Counsel; ORDER—Stubenberg w/draws & Alson appears for Intervenors-Appellees Portlock Comm. Assn. (Maunalua Beach); Kokohead Lease-Fee, Inc.; West Marina Comm. Assn.; Hahaione Valley Comm. Assn. *YOUNG*
		EO: discussion re: the order from the 9th CCA—pltf's M/Injunctive Relief set for 7-9-83 @ 10 am *KING*

DATE	NR.	PROCEEDINGS
14	180	Hawaii's Statement of Objections to Plaintiffs' Proposed Amended Final Judgment and Permanent Injunction; Appendix A—referred to Judge King
	181	MOTION for Temporary Restraining Order—Affidavit of Clinton R. Ashford—Attorney's Certificate
	182	Memorandum Regarding Form of Amended Judgment Upon Remand; Exhibits "A", "B", "C" ad "D"—referred to Judge King
15		*EP*: Govt's Motion for the Admission of Lawrence Tribe GRANTED—Pltf's Motion for Permanent Injunction—DENIED—Court Will Issue Order on Declaratory Judgment (YI) *KING*
	183	Intervenors-Defendants' Memorandum In Opposition to Permanent Injunction
18		Partial Transcript of Proceedings (YI) 7-15-83
25		*EO*: conference re: form of the order set for 7-28-83 @ 10 am—all parties notified by phone *KING*
28		Transcript of Proceedings—7-15-83 (YI) Original
	184	Amended FINAL JUDGMENT & Permanent Injunction-See Document for Details *KING*
29	185	ORDER Denying Request for Permanent Injunction *KING*
Aug 15	186	Order—from 9th CCA—appellants' emergency M/Recall the Mandate Granted

DATE	NR.	PROCEEDINGS
26	187	NOTICE OF APPEAL (By Plaintiffs); Copy of NA mailed to Clerk, 9th CCA, Lilly, Watts, Park, Bays & O'Connor
Sep 6	188	Transcript Designation and Order—7-15-83 (YI)—Already on file
	189	Notice of Intended Designation of Reporter's Transcript and Statement of the Issues
13	190	Notice of Cross-Designation of Reporter's Transcript—Do not intend to designate any further portions—(Park/Alston)
20	191	Notice of Change of Address—Thomas T. Watts
21	192	Designation of Reporter's Transcript—By Plaintiffs—7-15-83—Already on file
		Certificate of Record mailed to Clerk, 9th CCA; Copy of CR, docket sheet & Designation of Clerk's Record on Appeal form mailed to Ashford/Fazio, Morry/Sato, Lilly, Tribe, Watts, Alston, Case/Bays/Waters & O'Connor/Uyeno

Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs/Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants/Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants/Appellees.

DATE	*FILINGS-PROCEEDINGS*
1980	
July 14	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. ec
Jul 25	Filed CERTIFICATE OF RECORD (1/26/80). ss
Jul 25	Aplt (Midkiff) opening brief due 9/3/80. ss
Aug 12	Fld mtn & ord (Clk) gtng Aplt/Pet ext of time to fl opng/reply brf to: Oct 20 1980 kf

DATE	*FILINGS-PROCEEDINGS*
Oct 20	Filed orig & 15 aplts' opening briefs & 5 Excerpts. (10/20) ogm
Oct 20	Filed 10 aplts' appendices (Statutes, Rules, Regulations, etc.,)(10/20). ogm
Nov 14	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: Jan 21 1981 sh
Nov 21	Fld mtn & ord (Clk) gtng Aple/Resp ext of time to fl answg brf to: *TOM* Jan 21 1980 kf
Nov 24	Fld mtn & ord (dep clk) granting Int/aples KAHALA COMM ASSOC & KAHALA COMM FEE PURCH FUND'S an ext of time to file brief to Jan 21, 1981. kf
Nov 24	Fld mtn & ord (dep clk) granting Int/aple WAI-KAHALA TRACT H an ext of time to file brief to Jan 21, 1981. kf
Nov 25	Fld mtn & ord (dep.clK) granting Int/aple HALAWA VALLEY ESTATES an ext of time to file brief to Jan 21, 1981. kf
1981	
Jan 13	Fl mtn & ord (CLK) gtng Aple (PAUL A. TOM, et al.,) ext of time to fl their Answering brief to: 2-20-81. bbm
Jan. 16	Fld mtn & ord (CLK) gtng Intervenors-Aples (WAI-KAHALA TRACT "H" ASSOC., et al.,) ext of time to fl. their brief to: 2-20-81. bbm
Jan 20	R'cvd as of 1/19, orig & 15 intervenor/aples' briefs (PORTLOCK COMMUNITY ASSOCIATION, KOKOHEAD COMMUNITY, etc.,); no proof of service; no Rule 13(e & j); notified counsel by letter. ogm

DATE	*FILINGS-PROCEEDINGS*
Jan. 27	Fld mtn & ord (CLK) gtng Interven.-Aples (KAHALA COMMUNITY ASSOC. & KAHALA COMMUNITY FEE PUR. FUND) ext of time to fl brief to 2-20-81. bbm
Jan 29	Filed as of 1/19, orig & 15 intervenor/aples' briefs (PORTLOCK COMMUNITY ASSO., et al., (1/19/81); deficiencies corrected. ogm
Feb. 9	Fld mtn & ord (CLK) gtng Aplts (FRANK E. MIDKIFF & et al.,) an ext of time to file Reply brief to: 3-9-81. bbm
Feb 23	Filed orig & 15 Int/Aple (WAI-KAHALA TRACT "H" ASS'N) ans brief (2/20). pf
Feb 23	Filed orig & 15 Int/Aple (KAHALA COMMUNITY ASS'N) ans brief (2/20). pf
Feb 24	Filed orig & 15 Aple's (TOM ET AL.) ans brief (2/20). pf
March 9	Filed aplts' motion for first and second exts of time in which to file reply brief with affidavit of Clinton R. Ashford in support of. (CIVATT) 3/5 rmc
March 12	Filed order (MO ATTY) aplts are granted an ext of time to and including April 23, 1981 in which to file their reply briefs. This order is subject to reconsideration by a judge if any opposition is filed within ten (10) days of the entry of the order. rmc
Mar 26	FILED as of 7/25/80 CERT RECORD ON APPEAL IN FOURTEEN VOLS, PLDGS, VOL I-IV copy R/T VOL V-XIV orig pv
Apr 24	Filed as of 4/23, orig & 15 aplts' reply briefs. (4/23) ogm

DATE	*FILINGS-PROCEEDINGS*
Oct. 13	Filed motion of intervenor-appellees (Kahala Community Association, Inc. & Kahala Community Purchase Fund) for add'l time for oral argument to (panel). jr 10/9/81
Oct 13	Rec'd aplts' letter of add'l authority to (panel). jr
Oct 16	Filed order (Poole) pursuant to the motion for add'l time for oral argument filed on 10/13/81, by intervenor aples, Kahala Community Association, Inc. and Kahala Community Purchase Fund, an add'l 10 minutes oral argument will be allocated to each side. jr
Oct. 21	ARGUED BEFORE: ALARCON, POOLE & FERGUSON; CJJ. Ordered from the bench: aplt's counsel will submit a letter brief 7 days from today. Apels' counsel will submit a response 7 days after receipt of aplt's letter brief. Submission deferred until Tuesday, November 3, 1981.
Oct. 30	Rec'd aplt's letter brief requested by court during oral argument to (panel). jr 10/28/81
Oct. 30	Rec'd aples' letter brief requested by court during oral argument to (panel). jr 10/28/81
Oct 30	Rec'd, as of 10/19/81, intervening aple's (Portlock) letter of 10/14/81 re: errors in the Table of Authorities to (panel). jr
Nov. 3	Rec'd, as of 10/20/81, intervenor's (Kahala Community, et al) letter of add'l authorities to (panel). jr
Nov. 3	Recvd as of Oct. 30 aples' letter brief requested by ct during oral argument. (Panel) 10/28. ag
Nov. 3	Recvd as of Oct. 30 intervenor-aples' (WAI-KAHALA TRACT "H" ASSOC., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag

DATE	*FILINGS-PROCEEDINGS*
Nov. 3	Recvd as of Nov. 2 intervenor-aples' (KAHALA COMMUNITY ASSOC., et al.) letter brief requested by ct during oral argument. (Panel) 10/28. ag
Nov. 3	CAUSE SUBMITTED FOR DECISION PURSUANT TO MINUTE ORDER OF 10/21/81. jr
Nov. 9	Recvd letter dated Nov. 4 from Rosemary T. Fazio, counsel for aplts, re: reply to aples' letter briefs previously recvd. (Panel) 11/4. ag
Dec. 10	Recvd letter dated Dec. 7 from Dennis O'Connor, counsel for Intervenor-Aple's (Wai-Kahala Tract "H" Assn), re: additional citations. (Panel) 12/9. ag
Dec. 17	Recvd letter dated Dec. 15 from Clinton R. Ashford, counsel for aplts, re: response to Intervenor-Aple's add'l citations. (Panel) 12/15. ag
1982	
March 29	Recvd intervenor-aples' (WAI-KAHALA TRACT "H" ASSOC., et al.) supplemental letter brief per ct's request at oral argument. (Panel) 3/25. ag
1983	
Mar 28	ORDERED OPINION (ALARCON) POOLE CONCURRING & FERGUSON DISSENTING FILED & JUDG TO BE FILED & ENTD.
Mar 28	Filed Opinion-REVERSED & REMANDED.
Mar 28	Filed & Entered Judgment. sz
Mar 31	Filed Aplt's Emergency Motion for Preliminary Injunction Pending Issuance of Mandate. 3/30 PANEL EM

DATE	*FILINGS-PROCEEDINGS*
Apr 1	Filed Aple's Memorandum in Opposition to Emergency Motion for Preliminary Injunction pending appeal; Affidavit of James Case, Dennis O'Connor, and A. Bernard Bays. 3/31 PANEL EM
Apr 1	Filed Aplt's Supplemental Memorandum in support of Emergency Motion for preliminary injunction. 3/31 PANEL EM
Apr 5	Filed Intervenor-Appellees Motion in opposition to emergency motion for preliminary injunction pending issuance of mandate; and Withdrawal and Appearance of Counsel. 4/4 PANEL EM
Apr 5	Filed Deft-Aple's (Hawaii) Opposition to Aplt's Emergency Motion for Preliminary injunction pending issuance of mandate. 4/4 PANEL EM
Apr 5	Filed Order (ALARCON, POOLE and FERGUSON, CJJ) Pending a ruling on aplts' emergency motion for injunctive relief, appellees Hawaii Housing Authority, its agents and representatives, and all those acting in concert with it are restrained from further prosecuting *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408, in the First Circuit Court of the State of Hawaii. At oral argument to be held by a telephone conference call, appellees shall show cause why aplts' motion should not be granted and appellees be required to take all steps necessary to terminate the state proceedings. The parties will be notified subsequently of the time and date of oral argument. Judge Ferguson dissenting. (Case file) ogm
Apr 6	Filed Intervenors/Appellees' (KAHALA COMMUNITY ASSOC., et al.,) motion for oral argument and suggestion for hearing en banc on pltfs/aplts emergency motion for preliminary injunction pending issuance of mandate; memorandum in support thereof. 4/5 (Panel) ogm

DATE	FILINGS-PROCEEDINGS
Apr 6	Filed Intervenors'/Appellees' (WAI-KAHALA TRACT "H" ASSOC., et al.,) motion for personal appearance and oral argument and suggestion for hearing en banc and aplt's emergency motion to enjoin parties to Hawaii State Court Proceedings. (Panel) 4/5 ogm
Apr 6	Filed Affidavit of Dennis E. W. O'Connor in opposition to emergency motion for preliminary injunction pending issuance of mandate. (Panel) 4/5 ogm
Apr 6	Filed deft/appellees' (Hawaii, et al.,) motion for personal appearance at oral argument and suggestion for hearing en banc on aplts' emergency motion to enjoin ongoing Hawaii State Court Proceedings; Affidavit of George R. Ariyoshi. (Panel) 4/5 ogm
Apr 6	Filed Orig & 33 Intervenors'/Appellees' (WAI KAHALA TRACT "H" ASSOC., ET AL.,) Petition for Rehearing and Suggestion for Hearing En Banc. (Panel, active judges) 4/5 ogm
Apr 6	Filed Order (ALARCON, POOLE & FERGUSON) Aples' request to hold the hearing directed by the court's April 5, 1983 order in person rather than by a telephone conference call is granted. Argument will be held in S.F. on Apr 14, 1983 at 1:30 p.m. pacific time. No later than Apr 12, 1983, the parties may file supplemental materials addressing the issues raised by aplts' emergency motion for injunctive relief. In addition to filing these materials with the clerk in S.F., copies may be sent directly to the chambers of the members of the panel. js

DATE	*FILINGS-PROCEEDINGS*
Apr 8	Filed Orig & ee Intervenors-Appellees [Kahala Comm. Assoc., Inc., et al] Petition For Rehearing and Suggestion of Rehearing En Banc. 4/7 (Panel & Active Judges) ot
Apr 11	Filed Intervenor-Aple's Memorandum in opposition to aplts Emergency Motion for Preliminary Injunction Pending Issuance of Mandate; 4/11 PANEL EM
Apr 11	Filed State of Hawaii's Appendix and Exhibits in Opposition to Aplt's Emergency Motion for preliminary injunction. 4/11 PANEL EM
Apr 11	Filed Aples' [Hawaii] Petition for Reconsideration And Suggestion For Rehearing En Banc. 4/8 (Panel & Active Judges) -ot-
Apr 11	Filed Intervenors-Aples [Portlock Community Assoc., Kokohead Community Lease-Fee, Inc.; West Marina Community Assoc.; and Hahaione Vly Community Assoc] Petition For Rehearing Suggestion of Appropriateness of Rehearing En Banc. 4/10 (Panel & Active Judges) -ot-
Apr 12	Filed Pltfs'/Aplts' Reply Memorandum in support of the emergency motion; Affidavit and Exhs. A thru F, attached thereof. (Panel) 4/12 ogm
Apr 12	Filed Intervenor/Aples' Supplemental memorandum in opposition to emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm
Apr 12	Filed Hawaii's Supplemental Memorandum in opposition to aplts' emergency motion for prel. injunction pending issuance of mandate. (Panel) 4/11 ogm

DATE	*FILINGS-PROCEEDINGS*
April 13	Filed amicus curiae, Acting Chief Justice (Herman T. F. Lum) and Acting Administrative Head of the judiciary of the State of Hawaii, memorandum in opposing the issuance of federal injunctive relief against state court proceedings in the instant case. gb (4/12) (PANEL) w/cover letter
Apr 14	Filed aplt's Motion to strike Appendix "A" to deft-aples' Memorandum in opposition to Pltf-aplt's Emergency Motion. 4/13 PANEL em
Apr 14	Filed ORDER (Alarcon and Poole) vacating filing of forty exhibits attached to affidavit of Michael A. Lilly. Docements may be lodged with the court subject to later determination as to whether any of the items should become part of the record. c2
Apr 14	Filed Aplt's Bill of Cost. 4/11 -ot-
Apr 14	Argument on aplt's emergency motion for injunctive relief before: Alarcon, Poole and Ferguson. c2
Apr 14	Filed Order (ALARCON, FERGUSON and POOLE, CJJ) The motion for an injunction directing the parties to stay further prosecution of the matter entitled Hawaii Housing Authority, Plaintiff, v. Frank E. Midkiff, et al., Defts, now pending in the Circuit Court of the First Circuit, State of Hawaii, at Civil No. 63408 thereof, is denied. The order to show cause is vacated and the stay heretofore entered is dissolved. All parties to bear their own costs of this appeal. ogm
Apr 15	Filed Order (CHIEF DEP CLK) The motion of Herman T.F. Lum, Acting Administrative Head of the Judiciary of the State of Hawaii, to file an amicus curiae memorandum is granted. The motion of aples' for a hearing en banc on aplt's

DATE	FILINGS-PROCEEDINGS
	emergency motion for an injunction is denied. The final word of the order filed Apr 14, 1983 denying the injunction is changed from "appeal" to proceeding." js
Apr 21	Filed Intervenor's-Aple's objection to the Bill of Cost. 4/20 -ot-
Apr 27	Filed intervenor's-aple's, (Kamiloiki Community Assos.), Motion for order lodging exhibits one through forty attached to the affidavit of Michael A. Lilly as an appendix; Affidavit of Theodore Y. Uyeno; exhibit "A". 4/25 PANEL SZ
Apr 27	Recv'd from the office of the Atty. Gen. of Hawaii, Appearnace of counsel Laurence H. Tribe as counsel of record for the defendant/appellees Paul A. Tom, T. Tanigughi, et al. sz
Apr 28	Filed Aplts' Memorandum In Support of Plaintiffs-Aplts Bill of Cost. 4/26
Apr 28	Filed Hawaii's Objection To Bill of Costs. 4/26
May 2	Filed Memorandum In Opposition To Hawaii's Objection To Bill of Costs of Plaintiffs-Aplts'. 4/28 -ot-
May 2	Filed Joinder In Objection To Bill of Costs Of Bishop Estate. 4/28 -ot-
May 2	Filed (Inter/Aple Halawa V1y) Joinder In Objection To Bill of Costs of Bishop Estate. 4/29 -ot-
May 2	Filed aplt's (Trustees of the Kamehameha Schools/Bishop Estate) Memorandum in opposition for order lodging exhibits one through forty. (4/29) PANEL sz
May 3	Filed Joint Motion To Withdraw Petition For Rehearing And Suggestion For Rehearing En Banc And An Application To Stay The Mandate

DATE	*FILINGS-PROCEEDINGS*
	Pending An Appeal To The United States Supreme Court Pursuant To 28 U.S.C. § 1254(2). 4/29 (PANEL) -ot-
May 4	Filed Memorandum In opposition To Intervenors-Aples' Objection To Bill of Costs of Plaintiff-Aplts. -ot-
May 6	Recv'd lrt dated April 27, from T. S. Hong, re: substitution of Michael Lilly for Yukio Naito, and lead counsel is proffessor Tribe. sz
May 9	Filed Aplts' Memorandum Opposing Joint Application To Stay The Mandate. 5/6 (Panel) -ot-
May 17	Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The motion to make exhibits one through forty part of the record is denied. Judges Alarcon and Poole have voted to deny the application to stay issuance of the mandate pending appeal to the U.S. Supreme Court. Judge Ferguson has voted to grant the stay of mandate. The application to stay mandate pending appeal is denied. ogm
June 8	Filed Orig & 33 Appellees' (Tom, et al.,) notice of withdrawal of Joint motion to withdraw petition for rehearing and suggestion for rehearing en banc with letter dated 6/7/83. (Panel) 6/7 ogm
June 13	Received on June 3, 1983 appearance of counsel of Richard J. Archer, for Intervenors/Appellees. (pw)
Jun 15	Filed Intervenors-Aples' Notice of Widrawal of Joint Motion To Withdraw Petition For Rehearing And Suggestion of Appropriateness of Rehearing En Banc. 6/15 (Panel) -ot-

DATE	*FILINGS-PROCEEDINGS*
June 17	Filed Order (ALARCON, FERGUSON, POOLE, CJJ) The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The joint motion to withdraw the petition for rehearing and suggestion for rehearing en banc is dismissed as moot. The several notices of withdrawal of the above joint motion are dismissed as moot. ogm
Jun 27	MANDATE ISSUED
Jun 27	Filed Motion For Award of Plaintiffs-Appellants' Attys' fees Or For Remand With Directions To Ward Fees. 6/24 (CIVATT) -ot-
Jul 11	Filed Joint Defendants-Appellees' and Intervenors-Appellees' objection To Plaintiff-Appellants' Application For Attorneys' Fees And Memorandum of Points And Authorities In Support of Objections. 7/8 (CIVATT) -ot-
Jul 11	Filed Intervenors-Appellees' [KAHALA COMMUNITY, ETC., ET AL.] Opposition to Plaintiffs-Appellants' Motion For Award of Attys' Fees. 7/8 (CIVATT) -ot-
Jul 13	Filed Aplts' Reply Memorandum In Support of Plaintiffs-Appellants' Motion For Award of Attys' Fees. 7/12 (CIVATT) -ot-
Jul 15	Filed Intervenors-Aples' Notice of Appeal To The Supreme Court of The United States. 7/14 -ot-
Jul 15	Filed Aples' Notice of Appeal to SC. 7/14 -ot-
Jul 19	Filed Inter-Aples [KAHALA COMM ASSOC., ET AL.] Notice of Appeal To The Supreme Court of The United States. 7/18 -ot-
Jul 19	Filed Aplt's Emergency Motion To Recall Or Clarify Mandate. 7/19 (Panel)

DATE	*FILINGS-PROCEEDINGS*
Jul 20	Filed Memorandum In Opposition To Emergency Motion To Recall Or Clarify Mandate. 7/19 (Panel) -ot-
July 21	Filed Order (ALARCON, POOLE and FERGUSON, CJJ) The panel has considered aplts' emergency motion to recall or clarify the mandate and has concluded that it is not of an emergent nature. In accordance with this finding, the appellees are directed to file a response to the motion by 5:00 p.m. Friday, July 29, 1983. Copies of the response shall be served on all parties. Aplts' shall file a reply, if any, no later than 5:30 p.m., Friday, August 5, 1983. ogm
Jul 22	Filed Intervenors-Aples' (HALAWA HILS LAND-SALE COMMITTEE, ET AL.) Joinder In defendants-Aples' Notice of Appeal. 7/21
July 28	Filed Deft-Aple's memorandum in opposition to emergency motion to recall or clarify mandate. 7/27 (PANEL) EM
July 29	Filed Intervenors-Appellees (Halawa Hills) Memorandum in opposition to emergency motion to recall or clarify mandate. 7/29 (PANEL)
July 29	Filed Intervenors-Appellees (Portlock Community) Memorandum in opposition to emergency motion to recall or clarify mandate. 7/28 (PANEL)
Aug 4	Filed Aplt's Reply Memorandum in support of Emergency Motion to recall or clarify mandate. 8/4 PANEL EM
Aug 8	Filed Deft-Aple's (Hawaii) Appendix B to Hawaii's Memorandum in opposition to emergency motion to recall or clairfy mandate. 8/4 PANEL EM

DATE	*FILINGS-PROCEEDINGS*
Aug 8	Received notice from SC of the filing of petition for cert on 7/28/83, SC# 83-141 EM
Aug 11	Filed order (ALARCON, POOLE, & FERGUSON) Aplt's emergency motion to recall the mandate is granted. It appears that this court's opinion of March 28, 1983, reversing the DC's denial to aplts of declaratory and injunctive relief, and holding unconstitutional the Hawaii Land Reform Act, has not been fully understood or implemented pursuant to our mandate. The DC has indicated uncertainty as to our intention set forth in the opinion. We therefore recall the mandate in order that it be clarified for the benefit of the parties and the DC. Within 10 days of the entry of this order the parties may submit supplemental memoranda discussing the form of decree to be issued in the circumstances of this case. Should this court conclude that oral argument is necessary, the parties will be notified by the clerk of the time and place. Pending the issuance of a revised mandate in this appeal, aples the Hawaii Housing Authority and the Intervenors, their agents and all those acting in concert with them, are, except in connection with any appeal or application to the SC of the U.S., enjoined from pursuing any administrative or judicial proceedings, or from initiating any new administrative or judicial proceedings against aplts under chapter 516 of the Hawaii Revised Statues. sz
Aug 17.	Recv'd letter from counsel for aple (Hawaii) re: confirming L.H. Tribe's appearance of counsel. lw
August 17	Filed aple's (State of Hawaii, Wai-Kahala Tract "H") motion to continue the submission of memoranda and determination pursuant to the order

DATE	*FILINGS-PROCEEDINGS*
	of August 11, 1983 until a ruling by the United States Supreme Court on the aples' motion of August 15, 1983. PANEL lw
August 18	Filed Supplemental declaration of R.J. Archer in support of aples' motion to continue the submission of memoranda and determination pursuant to the order of Aug. 11, 1983 until a ruling by the U.S. Supreme Court on the aple's motion of 8/15/83. PANEL (8/18) lw
August 19	Filed aplts' supplementary memorandum in support of emergency motion to recall or clarify mandate. PANEL (8/19) lw
August 19	Filed Order (ALARCON, POOLE, FERGUSON) On August 18, 1983 we recv'd a motion of aple Wai-Kahala Tract "H" and by the State of HI seeking an extension of the time in which the parties are to file the memoranda requested by our Order of Aug. 11, 1983, pending a ruling on an emergency motion to vacate or stay that Order which, we are advised, has been presented by aples to Justice William H. Rehnquist In Chambers. The motion of extension of time is granted. The requested submissions need not be made until further order of the court. lw
August 22	Filed aplts' memorandum in opposition to aples' motion to continue. PANEL (8/19) lw
Aug. 22	Filed intervenors/aples' (Kahala Comm. Asso. & Kahala Comm. Fee Purch. Fund) Supplemental Memorandum. PANEL (8/19) lw
Aug. 22	Filed intrvnrs/aples' (Portlock Comm., Kokohead Comm., W. Marina Comm., Hahaione Valley) Supplemental Memorandum PANEL (8/19) lw

DATE	*FILINGS-PROCEEDINGS*
Aug. 22	Recv'd copy of letter to parties from Clerk's office for the Supreme Court re: requesting aples to file a response. PANEL lw
Aug. 22	Filed intrvnr/aples (State of HI, Wai-Kahala Tract H) memorandum in response to the order of 8/11/83 clarifying the mandate. PANEL 8/18 lw
Aug 31	Filed Appellees' (Trustees) opposition to aplts' motion to vacate or stay order of U.S. Court of Appeals recalling & clarifying mandate. (Panel) 8/19 ogm
Sept 2	R'cvd Notice by SC of filing appeal (2 separate appeals) on 8/10/83 and 8/16/83 (SC Nos. 83-236; 83-283). ogm
Sept 6	R'cvd from aplts' trustees, Kamehameha Schools/ Bishop Estates' counsel, copy of Justice Rehnquist's denial of HHA request to stay Court's order of 8/11/83, etc., (Panel) 9/6 ogm
Sept 7	R'cvd aplt's (State of Hawaii) response to aples' opposition to motion to vacate or stay, submitted to Justice Rehnquist on 8/23/83. (Panel) 9/6 ogm
Sep 9	Filed State of Hawaii's memorandum in response to Order of 8/11/83, recalling the mandate. (Panel) 9/9 ogm
Sept. 9	Filed as of Sept. 8, Order (ALARCON, POOLE & FERGUSON) on Sept. 6, 1983, the Clerk recvd a copy of Justice Rehnquist's memorandum decision in chambers, denying aples' application to stay or vacate this Court's Order of Aug. 11, 1983. The parties have now suggested that in the light of Justice Rehnquist's comments, our resolution of certain aspects of the Aug. 11th Order might be assisted by further briefing by the parties. The Court agrees. It is Ordered, Aples may

DATE	*FILINGS-PROCEEDINGS*
	file their brief by September 16, 1983; aplts may respond by September 24, 1983; and aples may reply by Sept. 27, 1983. The Clerk will advise the parties whether oral hearing will be held. gb
Sept 16	Filed Aple's (WAI-KAHALA TRACT "H" ASSOCIATION) memorandum in response to court's order of 9/8/83. (PANEL) 9/15 ogm
Sept 16	Filed Aples' (KAHALA COMMUNITY ASSN, et al.,) memorandum in response to court's order of 9/8/83. (PANEL) 9/15/83 ogm
Sept. 23	Filed pltf/aplt's (Midkiff) answering memorandum to aples' memorandua concerning order of Aug. 11, 1983. PANEL 9/22 lw
Sept 27	Filed State of Hawaii's reply memorandum re order of August 11, 1983. PANEL 9/27 sz
Sept. 28	Filed aplt's errata sheet for memorandum filed 9/23/83. PANEL 9/27 lw
Sept 30	Filed order (ALARCON, POOLE & FERGUSON) Oral argument will be heard in this case on Monday, October 31, 1983 at 9:00 a.m. at the U.S. DC in Hawaii. Counsel should be prepared to discuss the issues raised in this court's order of August 11, 1983 and September 9, 1983. Each side will be premitted thirty minutes of argument time. sz
Oct 4	Filed Joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate (Intervenor-Aples, Halawa Hills Landsale Committee, et al.,). (Panel) 10/3 ogm
Oct 5	R'cvd letter from E. Barrett Prettyman, Jr., re: topics to discuss in the argument, etc., (Panel)

DATE	*FILINGS-PROCEEDINGS*
Oct 6	Filed aplts' memorandum in opposition to aples' joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate. (Panel) 10/4 ogm
Oct 7	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) The court's schedule cannot accommodate the expedited hearing jointly requested by the several appellees. The motion to expedite the date is denied. Oral argument will be heard as scheduled on Monday, Oct. 31, 1983 at 9:30 a.m. at the United States Courthouse in Honolulu, Hawaii. Each side shall have one hour for argument. The Clerk of Court will designate the courtroom. -ot-
Oct 11	Rec'd Joinder in joint emergency motion to expedite hearing on emergency motion to recall or clarify mandate. 10/7 (moot) -ot-
Oct 25	R'cvd Supplemental affidavit of Clinton R. Ashford. (Panel) 10/25 ogm
Oct. 31	ARGUED in Hawaii before: ALARCON, POOLE, FERGUSON, CJJ. Submission deferred until Nov. 14, 1983. -mlm-
Nov. 3	Filed certified copy of SC order: The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with no. 83-236, ***Portlock Community Assoc. (Maunalua Beach), et al. vs. Frank E. Midkiff, et al.*** and case no. 83-283, ***Kahala Community Assoc., inc., et al vs. Frank E. Midkiff, et al.***, and a total of one hour is allotted for oral argument. (filed in SC on October 31, 1983, SC# 83-141)

DATE	*FILINGS-PROCEEDINGS*
Nov. 3	Filed certified copy of SC order filed in SC 10/31/83 (SC# 83-236) The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with case No. 83-141, *Hawaii Housing Authority, et al. v. Frank Midkiff, et al*, and case no. 83-238, *Kahala Community Assoc., Inc., et al, vs. Frank Midkiff, et al* and a total of one hour is allotted for oral argument. lw
Nov. 3	Filed certified copy of SC order filed in SC 10/31/83 (SC# 83-283) The statement of jurisdiction in this case having been submitted and considered by the Court in this case probable jurisdiction is noted. This case is consolidated with case No. 83-141, *Hawaii Housing Authority, et al. vs. Frank E. Midkiff, et al*, and case No. 83-236, *Portlock Community Assoc., Inc., (Maunalua Beach), et al, vs. Frank Midkiff, et al*, and a total of one hour is allotted for oral argument. lw
Nov 3	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) The parties are requested to advise the Court not later than Nov. 08, 1983 of the exact status, by number of all cases which have been filed as of this date under Chapter 516 by the Houseing Authority against Bishop Estate, including the number of cases already tried, those in which trial actually has begun, and those not yet tried. -ot-
Nov 4	Filed Order (ALARCON, POOLE & FERGUSON, CJJ) In addition to the information previously requested concerning the status of condemnation actions presently pending in Hawaii state courts against Bishop Estate Land under chapter 516, the parties are requested to advise the

DATE	FILINGS-PROCEEDINGS
	court of the number of individual residential lots that are embraced in each of the pending condemnation actions. -ot-
Nov 7	Rec'd letters dated 11/04/83 from the Intervenors-aples' (WAI-KAHALA TRACT H, ET AL.) one addressing the issues of jurisdiction and injuctive relief, and the other letter on a list of suggested exceptions to any injunctive order the court may issue submitted on behalf of Intervenor-aple. Wai-Kahala Tract H. (Panel) 11/04 -ot-
Nov 7	R'cvd letter from aples' Hawaii Atty. Gen., etc., of 11/4/83 in response to court's request on its jurisdiction to issue injunctive relief. (Panel) ogm
Nov 7	Filed aplts' statement of status of Chapter 516 cases filed against Kamehameha Schools/Bishop Estate. (Panel) ogm
Nov 7	R'cvd letter from Kamehameha Schools/Bishop Estate, re: response to court's order during oral argument on 10/31/83 regarding court's jurisdiction, etc. (Panel) ogm
Nov 8	Filed Intervenor-Appellees Kahala Community, etc., memorandum regarding scope of injunctive relief upon issuance of revised mandate

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING., NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

VERIFIED COMPLAINT

[Filed In The United States District Court, District of Hawaii, February 28, 1979]

COMPLAINT

Come now FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Plaintiffs, hereinafter for convenience called the "Trustees," and as grounds for their claims for relief against Defendants, allege:

1. *The Parties and Jurisdiction*

(1) Kamehameha Schools/Bishop Estate is a perpetual educational trust, established in 1887 under the will of Princess Bernice Pauahi Bishop. The Trustees are the duly qualified and acting Trustees of the Kamehameha Schools/Bishop Estate and bring this action solely in their capacity as such Trustees.

(2) Defendants PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, and NOBUYOSHI TAMURA are the public member Commissioners, and Defendants ANDREW I. T. CHANG (who is the Director of Social Services, State of Hawaii) and DAVID C. SLIPHER (who is the Special Assistant for Housing, State of Hawaii) are the ex officio voting member Commissioners, who together constitute the Hawaii Housing Authority (hereinafter for convenience called the "HHA"). Defendant FRANKLIN Y. K. SUNN is the Executive Director of the HHA. The HHA is a public body and a body corporate and politic with perpetual existence, created by the Legislature of Hawaii, having powers and duties established by the laws of Hawaii, including H.R.S. Chapters 356 and 516. Each Defendant is sued in his individual as well as his official capacity.

(3) This matter in controversy arises under the Constitution and laws of the United States and exceeds the sum of $10,000, exclusive of interest and costs. This Court has jurisdiction of the controversy and the power to grant the relief sought by the Trustees under the provisions of 28 U.S.C. §§ 1331, 1343 and 2201, and 42 U.S.C. § 1983.

(4) The corpus of the Kamehameha Schools/Bishop Estate consists principally of land in Hawaii, the rental of which generates virtually all of the income of the trust. This income includes annual rentals from leases covering more than 13,500 single family residential lots. The Kamehameha Schools/Bishop Estate devotes its entire net income to the operation of the Kamehameha Schools in Honolulu, Oahu, and extension programs of the Schools conducted at the Schools and at other

places in Hawaii. More than 2,600 full-time students attend the Schools, paying tuition and fees that, at most, cover only approximately fifteen percent (15%) of the costs of operating the Schools. In addition to the regular curricula for full-time elementary, intermediate and high school students, the Schools provide numerous special education programs for children and adults, such as campus summer experiences, family education, and programs for school drop-outs. Many of these are provided free of cost to the participants, who number more than 60,000 annually. The Schools also carry on an extensive educational research program in cooperation with the State of Hawaii Department of Education, the University of Hawaii and other educational institutions, principally aimed at developing successful techniques for the instruction of culturally deprived children. College scholarship funds are made available to certain graduates of the Schools and other local high schools. The Schools depend almost entirely upon the net income from the trust estate and have no other source of support except comparatively insignificant receipts from tuition and fees.

II. *The Statute and Defendants' Actions and Threats*

(5) H.R.S. Chapter 516 empowers the HHA to expropriate, through exercise of the State's eminent domain power, fee simple title to leased residential lots, compensating the lessor/owner at a statutorily limited rate. Upon the initiative and application of twenty five, or more than fifty per cent, of the lessees in a "development tract" (defined in § 516-1(2) as a single contiguous area of not less than five acres, developed and subdivided into single-family residential lots not exceeding two acres in size), the HHA may acquire fee simple title to any one or more of the leased lots in that tract. The HHA must sell the interests so acquired within sixty days to the lessees, upon whose applications the condemnation was effected, at prices which will constitute neither a source of revenue nor a profit for the State or the HHA. The statute encompasses and subjects to expropriation virtually all of the Trustees' leased

residential lots. A true copy of H.R.S. Chapter 516 as amended to date (that is, through the conclusion of the 1978 session of the Legislature of Hawaii) is attached hereto as Exhibit "A" and incorporated herein by reference.

(6) Under the statute, the State may not designate and acquire leased residential lots except upon initiative of the private lessees, through their filing of a petition for designation of the development tract and applications to purchase. H.R.S. § 516-22. Public funds may not be used, and funds furnished by the lessees applying to purchase must be used, for the purchase of the lots applied for unless the lessees are unable to obtain funds from private lenders at reasonable rates. In that event, the HHA may lend public funds to the lessees for the acquisition of fee simple titles. H.R.S. § 516-34. To date, the HHA has expropriated thousands of fee simple titles upon the applications of lessees. These transfers have all occurred on a voluntary basis, however, upon payment by the lessees of a previously agreed-upon price. No public funds have yet been used for any of these conversions. Also, while the statute permits the acquisition of lots as to which no application to purchase has been made (after application for purchase of other lots in the development tract by the minimum number of lessees), the HHA has not in any instance designated and acquired with public funds, or by exchange of public lands, any lot in any development tract. All residential lots designated and acquired in development tracts by the HHA, to date, have been upon the applications of the lessees of those lots, have been paid for with funds supplied by the lessees, and have been transferred to those lessees immediately following acquisition.

(7) The statute requires the HHA to institute eminent domain proceedings, within twelve months after designation, to acquire the fee simple interest in the development tract or portion thereof designated, unless prior thereto "the parties" voluntarily agree to the purchase and sale of the fee simple interest. H.R.S. § 516-23.

(8) Defendants, acting as the HHA and purporting to act under the statute, have commenced expropriation of the Trustees' fee simple title to the residential lots in Waialae-Kahala Neighborhood Tract H (File Plan 559), consisting of 102 leased residential lots. More specifically:

(a) Defendants encouraged the filing of, and accepted, applications by lessees in Tract H to purchase the fee simple title to the lots they hold under lease and petitions by those lessees to designate Tract H as development tract. H.R.S. § 516-22.

(b) After publication of notice, Defendants held a public hearing on the proposed designation and acquisition of Tract H, on April 22, 1977.

(c) Defendants purported to determine, on October 20, 1978, that the acquisition of the Trustees' fee simple title to the leased lots in Tract H and disposition of the same to the lessees thereof would effectuate the so-called public purposes of H.R.S. Chapter 516.

(d) On October 23, 1978, the Defendants directed the Trustees to negotiate with the lessees of Tract H or their representative to determine the amount of the compensation to be paid to the Trustees, pursuant to the statutory formulas.

(e) Following the conclusion of contested, evidentiary hearings, held on November 20, 1978 and November 27, 1978, the Defendants, at their meeting on January 18, 1979, determined that negotiations between the Trustees and the lessees' representative concerning Tract H had failed.

(f) Purporting to act under H.R.S. § 516-51, Defendants by letter dated January 22, 1979 directed the Trustees to submit to mandatory arbitration with the lessees of Tract H lots for the purpose of determining the price to be paid for the Trustees' fee simple interest in the lots. The arbitrators' award will be "prima facie evidence" as to the application of the statutory formulas for determining "compensation" in the eminent domain proceedings to be instituted by the HHA. H.R.S. §§ 516-55, 24 and 1(14).

(g) At their meeting on February 16, 1979, Defendants reaffirmed their January 18, 1979 determination that the Tract H negotiations had failed.

(h) Tract H has been placed on the agenda for a special Hawaii Housing Authority meeting to be held on March 2, 1979.

(9) The Tract H arbitration threatens promptly to proceed to a conclusion and determine values for the Trustees' fee simple interests in the Tract H lots pursuant to the statutory formulas. Thereafter, Defendants intend to designate and acquire the Trustees' fee simple interests in those lots, to use funds provided by the lessees of those lots to make the payment to the Trustees required by H.R.S. Chapter 516, and to convey the titles so acquired to the lessees who are to furnish the funds for acquisition.

(10) In addition to these actions of Defendants with respect to Tract H, Defendants have accepted applications from lessees to purchase, and petitions from lessees to designate for acquisition, the Trustees' fee simple title to several thousand other leased residential lots. Defendants have held public hearings preliminary to designating more than twenty other development tracts and to acquiring the Trustees' fee simple titles to the leased lots within those tracts. Defendants have demonstrated by public statements, by their responses to lessees' applications and petitions, and in other ways, their intention to proceed under the purported statutory authority to acquire such titles for the benefit of the private lessees of the lots by the exercise of the State's power of eminent domain.

(11) All of the Trustees' leases of the residential lots affected by the statute are governed by lease-contracts, examples of which are attached hereto as Exhibits "B" and "C". All of said leases have twenty-five or more years to run until their expiration and approximately half of them were issued many years prior to the effective date of H.R.S. Chapter 516 and its earliest predecessor, Act 307, Session Laws of Hawaii 1967. In Tract H, for example, the Trustees leased all of the 102

residential lots during the period August 1, 1956, through May 1, 1957; only three of said leases have been cancelled and replaced by new leases issued subsequent to the effective date of Act 307. Each of the Trustees' leases establishes a lessor-lessee relationship for a period of fifty-five (55) years. Each lease-contract entitles the Trustees to receive, and obligates the lessee to pay to the Trustees, sums of money for rent and for real property taxes, assessments and other payments on account of the lessee's possession of the residential lot during the full term of the lease.

(12) The Trustees have, during the past decade, sold to several hundred of their lessees the fee simple interest in the lots which they occupied, pursuant to Internal Revenue Service rulings. The most recent of these sales occurred within the past few months. These sales have been made at prices and upon terms mutually agreed upon by the Trustees and their lessees, unrestricted by and without reference to H.R.S. Chapter 516. The Trustees intend to sell their fee simple interest in other lots, but these sales may be frustrated by the actions of the Defendants.

(13) There are many other owners of fee simple title to leased residential lots who are similarly situated with the Trustees. Some of these others own fewer than fifty leased residential lots that are subject to expropriation under the statute and some of them own hundreds of such lots. Some of them are private individuals, trusts or corporations, and others of them are charitable trusts or corporations. The Defendants have accepted applications to purchase and petitions to designate development tracts from thousands of lessees of those other owners; have held public hearings; have designated lots for acquisition; have acquired by eminent domain proceedings (or under the threat of such proceedings); and have transferred to lessees the fee simple titles to hundreds of residential lots leased by said other owners. The Defendants are threatening similarly to designate, acquire and transfer fee simple titles to hundreds or thousands more of the leased residential lots of said other owners.

III. *Unconstitutionality and Illegality*

(14) The acquisition of fee simple titles for lessees in possession, by the use of eminent domain under H.R.S. Chapter 516, deprives the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(a) The statute is for the sole purpose and has the sole effect of a forced transfer of fee simple titles from the owners thereof to the private lessees who currently occupy and who have the contractual right to continue to occupy the property. The statute is in effect a capital levy, totally unrelated to differences in uses to which land has been and is to be put, which merely transfers the monetary value of fee simple title to private persons. Not only does the statute fail to change current land use, it is specifically designed to continue and confirm the existing use of the affected lots for single-family occupancy.

(b) The statute does not restrict, restrain or regulate the terms or conditions of transfers or subleases or sales of the property after transfer of fee simple titles from the present owners to the lessees, unless state money is used for the purchase of the lessor's interest, in which event the only restriction is that the lessee-purchaser, for ten years, may not transfer the property without first giving the Hawaii Housing Authority the right to buy the land at a specified price. The statute also does not control or govern the use of the expropriated lots by the lessees after their acquisition of fee simple titles through the State's exercise of its eminent domain power. Once acquiring fee simple title, the lessees may lease, sell or otherwise dispose of the lots at any price and, subject only to restriction by county zoning regulations, may put the land to any use and purpose they may choose.

(c) The statute is not and cannot constitutionally be supported by the legislative findings or conclusions therein recited. The findings do not state a constitutionally permissible basis for the exercise of eminent domain, but on the contrary, demonstrate that the taking is not for a permissible public purpose, but merely for the transfer of fee simple title from the

present owners to lessees. Furthermore, these legislative findings are neither supported by the facts recited nor otherwise and do not justify the use of eminent domain in the manner and with the effect provided by the statute. Furthermore, the use of the ultimate governmental power of eminent domain, for the purposes provided by the statute, to seize and transfer fee simple titles from lessors to lessees, is not reasonably related to the legislative findings or conclusions and is neither necessary, appropriate nor effective for the purposes stated in the findings.

(15) Because the statute depends upon private persons to initiate a taking thereunder, H.R.S. § 516-22, it unconstitutionally delegates to private persons the ultimate and sovereign power of eminent domain and vests in private persons the critical powers of selection of the property and initiation of the proceedings. By reason of the foregoing, the statute violates the Fifth and Fourteenth Amendments to the Constitution of the United States. Additionally, by vesting *pro tanto* sovereign power in private persons, it violates Section 3 of the Hawaiian Admissions Act (Act of March 18, 1959; Public Law 86-3; 73 Stat. 4) which guarantees to the citizens of the State of Hawaii a republican form of government.

(16) The statute purports to define the just compensation to which the Trustees are entitled upon condemnation of the fee simple titles to their leased lots and to limit that compensation to determination by statutory formulas. These provisions constitute an unconstitutional legislative usurpation of judicial functions in derogation of rights secured to the Trustees under the Fifth and Fourteenth Amendments to the Constitution of the United States.

(17) The statutory formulas used to compute the compensation to be paid for the fee simple titles taken by eminent domain are neither fair, just nor reasonable. On the contrary, they violate the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States in that they fail to provide for payment of just compensation for the property condemned. These confiscatory formulas restrict pay-

ment to the smaller of alternative results, that is, the amount most favorable to the lessee, without reference to fairness or any economic or legally permissible basis.

(18) Action taken by the Defendants under the authority of H.R.S. Chapter 516 in directing the Trustees to engage in mandatory arbitration has deprived and will deprive the Trustees of rights secured to them by Article III of, and the Fifth and Fourteenth Amendments to, the Constitution of the United States by requiring them to engage in a process very costly in terms of money, time, attention and energy that

(a) is a determination by a privately selected panel having no authority from or responsibility to any public officer or agency, and whose costs and fees are imposed in part upon the Trustees,

(b) produces an award the statute directs will be prima facie evidence of the just compensation to be paid the Trustees in the eminent domain action thereafter to follow, and

(c) produces an award as to value that is regulated and limited by the statutory valuation formulas and that is as of a date prior in time and unrelated to the date of taking or summons.

(19) The provisions of the statute and the Defendants' actual and threatened actions pursuant thereto, have unlawfully and unconstitutionally interfered with, disrupted and impaired the Trustees' lease-contracts, in violation of Art. I, Section 10 of the Constitution of the United States. Compare, for example, the provisions of Exhibits "B" and "C" on the one hand and the provisions of H.R.S. § 516-24, 1(14), 26, 61, 63 to 66, and 70 on the other.

(20) An actual and present controversy exists between the Trustees and the Defendants concerning legal rights asserted by the Defendants and denied by the Trustees in matters in which they both have a concrete interest.

WHEREFORE, the Trustees pray that:

(1) This Court issue a preliminary injunction restraining the Defendants from any further proceedings with respect to the

Trustees or the Trustees' leased residential lots pending final determination of this Complaint;

(2) This Court find and declare that H.R.S. Chapter 516 is unconstitutional;

(3) This Court issue a permanent injunction against the Defendants, enjoining them from taking any action whatsoever under the purported authority of H.R.S. Chapter 516 with respect to the Trustees or the Trustees' leased residential lots;

(4) This Court award the Trustees their costs, expenses and attorneys' fees incurred in bringing this action; and

(5) This Court grant such other relief to the Trustees as may be equitable in the premises.

DATED: Honolulu, Hawaii; February 27, 1979.

[Exhibits "A," "B," and "C," and Summons omitted in printing]

Plaintiffs' Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

[Filed in the United States District Court,
District of Hawaii, February 28, 1979]

Plaintiffs, through their undersigned counsel, hereby move the Court for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure to enjoin Defendants, their officers, agents, employees, attorneys and all those in active concert or participation with them, from taking or continuing with any action in respect to Plaintiffs or Plaintiffs' residential leasehold property pursuant to H.R.S. Chapter 516, to order Defendants to suspend their recent direction to Plaintiffs to arbitrate the compensation to be paid for Plaintiffs' fee

simple interest in Waialae-Kahala Neighborhood Subdivision Tract H lots and to stay any proceedings pursuant to or in implementation of that direction to arbitrate, until a final hearing hearing and determination of the merits in the above-entitled action.

Unless Defendants are restrained and enjoined by order of this Court, Plaintiffs will suffer immediate and irreparable injury, loss and damage in that they will be deprived of their property without due process or just compensation, will suffer losses of leasehold revenue essential to the operations of the Kamehameha Schools, will be distracted and harassed with negotiations, arbitrations and condemnation suits to the extent they and their staff will be unable to perform their duties under the trust and the interests of the trust beneficiaries will be seriously prejudiced, and will incur extraordinary expenses for the protection of their contractual and property rights without any possibility of reimbursement and with the likelihood that it will all have been for naught when this Court grants the relief prayed for in Plaintiffs' Complaint. These aggravated injuries to Plaintiffs' constitutional property, contractual and economic rights will inevitably occur during the period required for this Court to adjudicate the issues presented by Plaintiffs' Complaint if this Court fails to restrain and enjoin Defendants as moved by Plaintiffs. This motion is made on the additional ground that Plaintiffs have no adequate remedy at law.

Plaintiffs base their motion upon the Verified Complaint, the Memorandum in Support of Motion, and Affidavits of Alfred J. Dow, Jr. and William Van Allen filed herewith, and upon such further evidence and argument as may be presented upon a hearing of this Motion.

DATED: Honolulu, Hawaii, February 28, 1979.

[Memorandum in Support of Motion for Preliminary Injunction, Affidavit of William Van Allen, Affidavit of Alfred J. Dow, Jr., and Notice of Motion omitted in printing]

Temporary Restraining Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civ. No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

vs.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

TEMPORARY RESTRAINING ORDER

[Filed in the United States District Court, District of Hawaii, February 28, 1979]

The Court has considered Plaintiffs' Motion for Temporary Restraining Order pending the hearing and determination of Plaintiffs' Motion for Preliminary Injunction; the Verified Complaint; the Memorandum in Support of Motion for Temporary Restraining Order, and Affidavit of Matsuo Takabuki attached thereto; and the Memorandum in Support of Motion for Preliminary Injunction and Affidavits of Alfred J. Dow, Jr. and William Van Allen filed herein; and it appearing that Defendants have ordered Plaintiffs into mandatory arbitration

pursuant to H.R.S. Chapter 516 with respect to their residential leasehold lots in Waialae-Kahala Neighborhood Subdivision Tract H, and that Plaintiffs ultimately may be deprived of their fee simple interest in Tract H without due process or just compensation, and that Defendants threaten to inundate Plaintiffs with additional costly and time-consuming procedures which have the potential of depriving Plaintiffs of the remainder of their residential leasehold property, again without the benefit of due process or just compensation; and it appearing from the Attorney's Certificate filed herein that Defendants and their attorneys received notice of the hearing; and

On the basis of these pleadings and papers, it appears to the Court that before Defendants or their attorneys can receive notice in the time generally required for such proceeding, Defendants' actions in regard to Plaintiffs and Plaintiffs' residential property would alter the status quo between Plaintiffs and Defendants and cause Plaintiffs immediate and irreparable injury, loss and damage;

IT IS THEREFORE ORDERED that:

1. Defendants suspend their order communicated by letter dated January 22, 1979, ordering the Plaintiffs into mandatory arbitration with respect to their residential leasehold lots in Waialae-Kahala Neighborhood Subdivision Tract H and stay any proceedings pursuant to or in implementation of that direction to arbitrate.

2. Defendants, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them, are enjoined and restrained from taking any other action with respect to Plaintiffs and Plaintiffs' residential property pursuant to H.R.S. Chapter 516, until such time as Plaintiffs' Motion for Preliminary Injunction can be heard and determined.

3. Plaintiffs' Motion for Preliminary Injunction will be heard by this Court 10:00 o'clock a.m. on March 10, 1979.

4. As a condition for obtaining this Order, Plaintiffs must post a letter of credit or other security in the sum of $100.00.

5. The temporary restraining order issued herein will expire on March 10, 1979, unless within such time the order is extended for good cause shown, or unless Defendants consent to an extension.

DATED: Honolulu, Hawaii; Feb. 28, 1979.

/s/ SAMUEL P. KING
United States District Judge

State Defendants' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants.

ANSWER TO COMPLAINT

[Filed in the United States District Court,
District of Hawaii, March 20, 1979]

Comes now the Hawaii Housing Authority, Commissioners of the Hawaii Housing Authority, and Franklin Sunn, by WAYNE MINAMI, Attorney General of the State of Hawaii, (hereinafter called the State Defendants) and in answer to the complaint filed herein admit, deny, and allege as follows:

FIRST DEFENSE:

1. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

2. The State Defendants admit the allegations contained in paragraphs 1 and 2 of the Complaint.

3. The State Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. As to paragraph 4 of the Complaint, the State Defendants are without sufficient knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and therefore deny the same.

5. As to paragraph 5 of the Complaint, the State Defendants admit that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit A, but deny the remaining allegations contained in paragraph 5 of the Complaint.

6. As to paragraph 6, State Defendants deny those allegations purporting to set forth the legal effect of Section 516-22 and Section 516-34, Hawaii Revised Statutes, as those sections are self-explanatory. The State Defendants deny the remaining allegations contained in paragraph 6 of the Complaint.

7. As to paragraph 7 of the Complaint, State Defendants deny the allegations purporting to set forth the legal effect of Section 516-23, Hawaii Revised Statutes, as that section speaks for itself.

8. As to paragraph 8 of the Complaint, the State Defendants deny the allegations as set forth in that paragraph.

(a) As to subparagraph (a), the State Defendants deny the allegtions contained in that subparagraph.

(b) As to subparagraph (b), the State Defendants admit the allegations contained in that subparagraph.

(c) As to subparagraph (c), the State Defendants admit that on October 20, 1978, the State Defendants determined that the acquisition of the Trustees' fee simple title to the leased lots in Tract H, and the disposition of the same to the lessees would effectuate the public purposes of chapter 516, Hawaii Revised Statutes.

(d) As to subparagraph (d) the State Defendants deny the allegations contained in that subparagraph.

(e) As to subparagraph (e) the State Defendants admit that impasse in negotiations between the Trustees and the lessees of Tract H had occurred by operation of law pursuant

to Amended Rule 10, Section 10, of the Rules and Regulations of the Department of Social Services and Housing, Hawaii Housing Authority.

(f) As to subparagraph (f), the State Defendants admit the allegations contained in that subparagraph, except that the State Defendants directed arbitration for the purpose of determining the "owner's basis".

(g) As to subparagraph (g) the State Defendants admit to the reaffirmation of their determination that impasse in negotiations in Tract H resulting from operation of law had occurred pursuant to Amended Rule 10, Section 10 of the Rules and Regulations of the Department of Social Services and Housing, Hawaii Housing Authority.

(h) As to subparagraph (h) of the Complaint, the State Defendants admit that Tract H was placed on the agenda for a special Hawaii Housing Authority meeting to be held on March 2, 1979, but with respect to Tract H, that meeting was only for the purpose of conferring with the attorney for Hawaii Housing Commission, and that no decision on any matter was contemplated concerning Tract H.

9. The State Defendants deny the allegations in paragraph 9 of the Complaint.

10. As to paragraph 10 of the Complaint, the State Defendants admit the allegations contained in the first two sentences, but deny the allegations contained in the last sentence of the paragraph.

11. As to paragraphs 11 and 12 of the Complaint, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same.

12. As to paragraph 13 of the Complaint, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and therefore deny the same, except that the State Defendants admit that they have accepted applications to purchase and petitions to designate development tracts from lessees of

owners other than Bishop Estate; have held public hearings; have designated lots for acquisition; have acquired by eminent domain proceedings (or under threat of such proceedings); and have transferred to lessees the fee simple titles to residential lots leased by said other owners.

13. As to paragraphs 14, (a), (b), (c); 15; 16; 17; 18, (a), (b), (c); 19 and 20; the State Defendants deny the allegations contained in those paragraphs.

14. Any allegation in the Complaint not heretofore admitted or denied is hereby denied.

THIRD DEFENSE:

15. Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE:

16. Plaintiffs are bound by the judgment entered in *Frank E. Midkiff, et al., vs. Ronald Y. Amemiya, et al.*, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

FIFTH DEFENSE:

17. The issues raised in the Complaint are not ripe for adjudication.

SIXTH DEFENSE:

18. This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

SEVENTH DEFENSE:

19. The Plaintiffs' claims are barred by laches.

EIGHTH DEFENSE:

20. The Plaintiffs' claims are barred by estoppel.

NINTH DEFENSE:

21. The Plaintiffs' claims are barred by waiver.

TENTH DEFENSE:

22. The Plaintiffs have failed to join indispensable parties.

ELEVENTH DEFENSE:

23. The Plaintiffs lack standing to assert to claims in the Complaint.

TWELFTH DEFENSE:

24. The Plaintiffs' claims are barred by the Doctrine of Unclean Hands.

THIRTEENTH DEFENSE:

25. The Plaintiffs' claims are barred by the Eleventh Amendment of the United States Constitution.

FOURTEENTH DEFENSE:

26. The Plaintiffs' claims are barred by the Doctrine of Official Immunity of the State Defendants sued in their official and individual capacities.

FIFTEENTH DEFENSE:

27. This Court lacks jurisdiction over the subject matter of this claim.

WHEREFORE, State Defendants pray that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, and grant such other relief that the Court deems appropriate.

DATED: Honolulu, Hawaii, March 20, 1979.

Order Allowing Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs,

v.

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID C. SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY,

Defendants.

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS LANDSALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I: PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY ASSOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY

FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

Intervenors.

ORDER GRANTING MOTIONS TO INTERVENE

[Filed in the United States District Court,
District of Hawaii, March 23, 1979]

The Motions to Intervene as party defendants by WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LAND-SALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH), KOKOHEAD COMMUNITY LEASE-FEE, INC., WEST MARINA COMMUNITY ASSOCIATION, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC., HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE, SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, WAIAU COMMUNITY ASSOCIATION, KAHALA COMMUNITY ASSOCIATION, INC., KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION, having been heard by this Court on March 14, 1979 at 10:00 o'clock a.m. with counsel for all parties and movants having been present, and the Court having considered the memoranda and arguments of the parties and movants,

IT IS HEREBY ORDERED that the Motions to Intervene are granted.

DATED: Honolulu, Hawaii, March 23, 1979.

/s/ SAMUEL P. KING
Judge of The Above-Entitled Court

Intervenors' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.,
Defendants.

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Intervenors.

ANSWER OF INTERVENING DEFENDANTS

[Filed in the United States District Court,
District of Hawaii, March 23, 1979]

Intervening Defendants above-named, answering the Complaint of Plaintiffs FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, allege as follows:

1. Intervening Defendants admit the allegations of paragraphs 1 and 2 of the Complaint.

2. Intervening Defendants deny the allegations of paragraph 3 of the Complaint.

3. Intervening Defendants are without knowledge as to the truth of the allegations of paragraph 4 of the Complaint.

4. Answering paragraph 5 of the Complaint, Intervening Defendants admit that Exhibit "A" to the Complaint is a true

copy of H.R.S. Chapter 516 as amended through 1978. Intervening Defendants deny that this Chapter in any way empowers the HHA to "expropriate" any fee simple title to leased residential lots, or provides for the payment of less than just compensation upon the exercise of the State power of eminent domain. Intervening Defendants deny that the Chapter authorizes the HHA to acquire fee simple title to leased lots solely and merely upon the application of lessees, or that such application is sufficient to effect condemnation, or that the HHA must in all circumstances sell fee simple interests acquired by condemnation to lessees residing thereon. Defendants affirmatively allege that prior to designation by the HHA of any area of residential houselots for acquisition, notice, hearing, and findings by HHA that such designation would effectuate the public purposes of Chapter 516 are required. Defendants admit that Chapter 516 defines a "development tract" as set forth in paragraph 5 of the Complaint, and that actions of the HHA pursuant to this Chapter are not intended to be a source of immediate revenue or direct monetary profit to the State, but deny that actions of the HHA pursuant to Chapter 516 will not constitute a benefit and profit to the State of Hawaii, and affirmatively allege that actions by the HHA under Chapter 516 constitute a profit to the State of Hawaii by effectuating the public purposes of this Act.

5. Answering paragraph 6 of the Complaint, Intervening Defendants admit that H.R.S. § 516-22 calls for the initiation of administrative proceedings at the behest of residential lessees such as Intervening Defendants through petition and application, and that H.R.S. § 516-34 provides that the use of public funds to finance purchases by lessees of the fee interest in residential houselots is limited to situations where reasonable private financing is not available. Intervening Defendants deny that public funds may not be used for the purchase of fee interests acquired by the HHA by this Act, and affirmatively allege that Chapter 516 provides for the use of such funds, through general obligation bonds of the State (H.R.S. § 516-45), issuance of bonds or obligation by the HHA (§ 516-40),

and establishment of a fee simple residential revolving fund (§ 516-44), among other provisions. Intervening Defendants deny that the HHA has "expropriated" any fee simple titles upon the application of lessees under Chapter 516. Intervening Defendants do not understand the allegation of paragraph 6 that "expropriations" have taken place in voluntary fee sales at prices agreed upon by the lessors and lessees concerned, and therefore must deny these allegations. Intervening Defendants admit that the HHA has not designated for acquisition or acquired with public funds or by exchange of public lands any lot in any development tract, and that all lots designated and acquired to date have been paid for with funds supplied by the lessees, and have been transferred to those lessees immediately following acquisition. Intervening Defendants affirmatively allege that this procedure has been carried out with the voluntary agreement, consent and cooperation of affected lessors/ fee owners.

6. Intervening defendants admit the allegations of paragraph 7 of the Complaint.

7. Answering paragraph 8 of the Complaint, Intervening Defendants deny that the HHA has in any way commenced "expropriation" of the Trustees' fee simple interest in Waialae-Kahala Neighborhood Tract H. Intervening Defendants admit that the HHA has accepted applications to purchase and petitions for designation from the members of Intervening Defendant Wai-Kahala Tract H Association Inc., and held a public hearing on the proposed designation and acquisition of Tract H on April 22, 1977. Intervening Defendants admit that the HHA on October 20, 1978 found that the public purposes of Chapter 516 would be effectuated by the acquisition of Tract H. Intervening Defendants deny that on October 20, 1978 the HHA directed the trustees to negotiate with the lessees of Tract H or their representatives to determine the amount of compensation to be paid to the trustees pursuant to the statutory formulas. Intervening Defendants affirmatively allege that on October 23, 1978, pursuant to Resolution No. 1694, the HHA requested the trustees to voluntarily negotiate

with Intervening Defendant the Wai-Kahala Tract H Association, Inc. to determine the trustees' basis in the lots in Tract H, requesting the trustees' cooperation with the lessees in negotiations to establish a just price for the trustees interest without resort to further proceedings under H.R.S. Chapter 516. Intervening Defendants admit that following evidentiary hearings, the HHA determined on January 18, 1979 that voluntary negotiations between the trustees and Intervening Defendant Wai-Kahala Tract H had failed. Intervening defendants admit that the HHA by letter dated January 22, 1979, ordered the trustees to begin mandatory arbitration under H.R.S. Chapter 516. Intervening Defendants deny that this arbitration is "for the purpose of determining the price to be paid" for the trustees' fee simple interest in the affected area. Intervening Defendants affirmatively allege that this arbitration, under H.R.S. Chapter 516, is not part of any action in condemnation or eminent domain; the decision of the aribtrators as to what would constitute just compensation for the trustees' fee simple interest in the affected area is not binding on the trustees, nor are the arbitrators empowered to issue any award transferring or purporting to transfer title to any property interest, or to order the trustees to sell or surrender any property interest. Intervening Defendants affirmatively allege that this arbitration is to apply the laws of the State of Hawaii relating to just compensation to the affected areas, to determine a fair and just price for the trustees' interest in these areas. Intervening Defendants affirmatively allege that this amount is subject to revision by the courts of the State of Hawaii at the behest of either party to the arbitration. Intervening Defendants deny that the arbitrators award will be "prima facia evidence" as to "the application of the statutory formulas for determining 'compensation' in the eminent domain proceedings to be instituted by the HHA." Intervening Defendants affirmatively allege that the arbitrators award will be prima facia evidence as to just compensation in any condemnation proceeding which may be instituted by the HHA, if such proceedings are ever instituted. Intervening Defendants admit that on February 16, 1979 the HHA reaffirmed their July 18, 1979 determination

that negotiations between the trustees and intervening defendant Tract H had failed, and that Tract H was placed on the agenda for a special HHA meeting on March 2, 1979.

8. Answering paragraph 9 of the complaint, Intervening Defendants admit that intervening defendant Tract H intends to pursue mandatory arbitration pursuant to H.R.S. Chapter 516. Intervening Defendants are without knowledge as to what the award of the arbitrators will be, and are without knowledge as to whether the figure decided upon by the arbitrators as "just compensation" will be satisfactory to the trustees and to Intervening Defendant Tract H, rendering further proceedings unnecessary. Intervening Defendants are informed and believe that the trustees want to sell their fee simple interest in the affected area, and will sell to Intervening Defendant Tract H lessees without any eminent domain proceedings being instituted if agreement can be reached as to price. Intervening Defendants are without knowledge as to the likelihood or necessity of further action by the HHA following arbitration.

9. Answering paragraph 10 of the complaint, Intervening Defendants admit that the HHA has accepted applications and petitions for areas other than Tract H, and has held public hearings pursuant thereto. Intervening Defendants deny that the HHA is proceeding on such applications for the private benefit of lessees, and affirmatively allege that the HHA is proceeding to effectuate the public purposes of H.R.S. Chapter 516.

10. Answering paragraph 11 of the complaint, Intervening Defendants admit that they are representatives of lessees of the trustees under written lease contracts, and are without knowledge as to the remaining allegations of this paragraph.

11. Intervening Defendants are without knowledge as to the truth of the allegation of paragraph 12.

12. Intervening Defendants are without knowledge as to the truth of the allegations of paragraph 13.

13. Intervening Defendants deny the allegations of paragraphs 14 through 20 of the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim for which relief may be granted.

THIRD DEFENSE

Plaintiffs' lawsuit is premature because they have failed to exhaust their State remedies.

FOURTH DEFENSE

Plaintiffs' claims are barred by estoppel.

FIFTH DEFENSE

Plaintiffs' claims are barred by waiver.

SIXTH DEFENSE

Plaintiffs' claims are barred by laches.

WHEREFORE, Intervening Defendants pray:

1. That the Complaint be dismissed

2. That they have their costs, expenses, attorneys' fees and any other and further relief as the Court deems just.

DATED: Honolulu, Hawaii, March 22, 1979.

Intervenors' Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION INC. and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

Defendant-Intervenors.

ANSWER TO COMPLAINT

[Filed in the United States District Court,
District of Hawaii, March 27, 1979]

The Kahala Community Association, Inc. (hereinafter the "Association") and the Kahala Community Association Fee Purchase Fund (hereinafter the "Fund"), for answer to the Complaint, admit, deny and allege as follows:

FIRST DEFENSE:

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

2. Intervenors admit the allegations contained in paragraphs 1 and 2 of the Complaint.

3. Intervenors deny the allegations contained in paragraphs 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

4. Intervenors are without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraphs 9, 10, 11 and 12 of the Complaint.

5. For answer to paragraph 3, Intervenors deny that this Court has jurisdiction of the controversy pursuant to 28 U.S.C. § 1343 or 42 U.S.C. § 1983 but admit the remaining allegations of paragraph 3 of the Complaint.

6. Intervenors admit that allegations contained in the first two sentences of paragraph 4 but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 4 and therefore deny the same.

7. For answer to paragraph 5, Intervenors admit that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit A, but deny the remaining allegations contained in paragraph 5 of the Complaint.

8. For answer to paragraph 6, Intervenors deny those allegations purporting to set forth the legal effect of Section 516-22 and Section 516-34, Hawaii Revised Statutes, which sections speak for themselves. Intervenors admit that the HHA has not to date used public funds to convert leasehold lots to fee simple. Intervenors deny the remaining allegations contained in paragraph 6.

9. For answer to paragraph 7, Intervenors deny the allegations purporting to set forth the legal effect of Section 516-23, Hawaii Revised Statutes, which section speaks for itself.

10. For answer to paragraph 8 of the Complaint, Intervenors admit the allegations contained in subparagraph 8(b), (c), (e), (f), (g) and (h), but deny the remaining allegations contained in paragraph 8.

11. For answer to paragraph 13, Intervenors admit that various leasehold development tracts not owned by Bishop Estate are subject to Chapter 516, and that fee conversion has been instituted or completed with respect to some of those tracts. Intervenors deny the remaining allegations contained in paragraph 13.

12. Intervenors deny all allegations of the Complaint not specifically answered hereinabove.

THIRD DEFENSE:

13. Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE:

14. Plaintiffs are bound by the judgment entered in *Frank E. Midkiff, et al. vs. Ronald Y. Amemiya, et al.*, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

FIFTH DEFENSE:

15. The issues raised in the Complaint are not ripe for adjudication.

SIXTH DEFENSE:

16. This Court should abstain from ruling on the matters raised in the Complaint until such time as state courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

SEVENTH DEFENSE:

17. Plaintiffs' claims are barred by laches.

EIGHTH DEFENSE:

18. Plaintiffs' claims are barred by estoppel.

NINTH DEFENSE:

19. Plaintiffs' claims are barred by reason of waiver.

TENTH DEFENSE:

20. Plaintiffs have failed to join indispensable parties.

ELEVENTH DEFENSE:

21. Plaintiffs lack standing to the claims asserted in the Complaint.

TWELFTH DEFENSE:

22. Plaintiffs' claims are barred by the Doctrine of Unclean Hands.

WHEREFORE, Defendant-Intervenors pray that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, award Defendant-Intervenors their reasonable attorneys' fees and costs of suit, and grant such other relief as the Court deems appropriate.

DATED: Honolulu, Hawaii, March 26, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.
Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Defendant-Intervenors.

DEFENDANT-INTERVENOR'S ANSWER TO COMPLAINT

[Filed in the United States District Court, District of Hawaii, March 28, 1979]

Defendant-Intervenor Halawa Valley Estates Fee Conversion Corporation (hereinafter referred to as "Intervenor"), for answer to the Complaint filed herein, alleges as follows:

1. Intervenor admits the allegations contained in Paragraphs 1 and 2 of the Complaint.

2. Intervenor denies the allegations contained in Paragraphs 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

3. Intervenor is without knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Complaint.

4. For answer to Paragraph 3, Intervenor denies that this Court has jurisdiction of the controversy pursuant to 28 U.S.C. § 1343 or 42 U.S.C. § 1983; but admits the remaining allegations of Paragraph 3 of the Complaint.

5. Intervenor admits the allegations contained in the first two sentences of Paragraph 4, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4, and the same are, therefore, denied.

6. For answer to Paragraph 5, Intervenor admits that a true copy of Chapter 516, Hawaii Revised Statutes, is attached to the Complaint as Exhibit "A," but denies the remaining allegations contained in Paragraph 5 of the Complaint.

7. For answer to Paragraph 6, Intervenor denies those allegations purporting to set forth the legal effect of H.R.S., §§ 516-22 and 516-34, which sections speak for themselves. Intervenor admits that the Hawaii Housing Authority has not to date used public funds to convert leasehold lots to fee simple. Intervenor denies the remaining allegations contained in Paragraph 6.

8. For answer to Paragraph 7, Intervenor denies the allegations purporting to set forth the legal effect of H.R.S., § 516-23, which section speaks for itself.

9. For answer to Paragraph 13, Intervenor admits that various leasehold development tracts not owned by Bishop Estate are subject to Chapter 516, Hawaii Revised Statutes, and that fee conversion has been instituted or completed with respect to some of those tracts. Intervenor denies the remaining allegations contained in Paragraph 13.

10. Intervenor denies all allegations of the Complaint not specifically answered hereinabove.

SECOND DEFENSE:

11. Plaintiffs are bound by the judgment entered in ***Frank E. Midkiff, et al. v. Ronald Y. Amemiya, et al.***, First Circuit Court of the State of Hawaii, Civil No. 47103, and are estopped to relitigate the matters decided in that action.

THIRD DEFENSE:

12. This Court should abstain from ruling on the matters raised in the Complaint until such time as State Courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

WHEREFORE, Intervenor prays that the Court find and declare that Chapter 516, Hawaii Revised Statutes, is constitutional, dismiss Plaintiffs' Complaint, award Intervenor its reasonable attorney's fees and costs of suit, and grant such other relief as the Court deems appropriate.

DATED: Honolulu, Hawaii, March 28, 1979.

State Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants.

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On February 28, 1979, Plaintiffs filed a Motion for Preliminary Injunction, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, to "suspend" State Defendants' recent direction to Plaintiffs to arbitrate the valuation of Plaintiffs' lease fee interest in certain property pursuant to Chapter 516, Hawaii Revised Statutes, the Hawaii "Land Reform Act." Plaintiffs' speculative arguments do not adequately justify a resort to the drastic remedy of a preliminary injunction. For the reasons discussed below, Plaintiffs' motion should be denied.

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V

THE DOCTRINE OF ABSTENTION IS APPLICABLE TO THE INSTANT CASE

A. *Introduction.*

The doctrine of abstention was first recognized by the United States Supreme Court in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) as applicable to a case which could have been resolved on questions of state law. In that case, Pullman was seeking to enjoin the enforcement of an order of the Commission claiming violations of its rights under the Fourteenth Amendment. Mr. Justice Frankfurter, speaking for a unanimous court, stated:

> But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court in Texas. *In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.* [Citations omitted.] The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the function of a premature constitutional adjudication. 312 U.S., at 499-500. (Emphasis added.)

The doctrine of abstention was described succinctly as follows:

> Where (1) unsettled questions of state law are enmeshed with federal questions in determining the validity and constitutionality of a state law or of state action, and (2) the state law problems are delicate ones, resolution of

> which is not without substantial difficulty, proper exercise of federal jurisdiction requires that the controversy be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal questions, usually a federal constitutional question. This is the "doctrine of abstention." The doctrine is not founded upon lack of power or jurisdiction but upon a sound judicial discretion of the District Court to decline to exercise jurisdiction in a proper case. *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Couch Employees of America, AFL-CIO v. Dalton*, 206 F.Supp. 629, 633 (W.D. Mo. 1962).

The doctrine has been applied and affirmed by a number of federal courts: *Struthers v. Robertson Lumber Co.*, 173 F.Supp. 204, 206 (D. Minn. 1959) ("Here we are asked to exercise our authority, including our equitable powers, in a case involving the construction and constitutionality of the laws of a sovereign foreign state involving an internal hassle between stockholders of a corporation created under that state's laws. We think this is a situation in which we should apply the doctrine of abstention. This embodies the exercise of our discretion to withhold the employment of our authority *in a matter primarily of state concern because of the rightful independence of the state governments and the authority of their courts to determine controversies peculiar to the state.*" (Emphasis added.)); *McCarty v. Borough of Ramsey*, 270 F.2d 232, 234 (3d Cir. 1959) ("[T]he state courts should be the ones to initially interpret their own statutes."); *Detroit Edison Co. v. East China Township School Dist. No. 3*, 247 F.Supp. 296, 305 (E.D. Mich. 1965) ("[T]he federal courts will generally abstain from holding a state statute unconstitutional until the state courts familiar with the local law have had an opportunity to construe it."); *Stadler v. County School Bd. of Prince Edward Ct., Va.*, 387 F.Supp. 997, 1000 (E.D. Va. 1974) ("Different situations dictate the application of one or more of the various recognized abstention doctrines: 1) to avoid decision of a federal constitutional question where the case may be

disposed of on questions of state law; . . . and 3) to leave to the states the resolution of unsettled questions of state law."); *Ahrensfeld v. Stephens*, 528 F.2d 193, 197 (7th Cir. 1975) ("Another is the susceptibility of a state statute attacked in federal court on constitutional grounds to a construction by a state court that would avoid or modify the constitutional questions."); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 71 F.R.D. 573, 575 (S.D. Cal. 1976) ("A corollary to the proposition that constitutional questions may be resolved by mootness in a state proceeding is the tenet that federal courts should leave to the states the resolution of unsettled questions of state law.") *Betts v. Reliable Collection Agency*, 422 F.Supp. 1140, 1142 (D. Haw. 1976) ("The general rule is that abstention is proper where resolution of the uncertain issue of state law 'might end the litigation and not give rise to any federal constitutional claim.' "). *Nehring v. Ariyoshi*, 443 F.Supp. 228, 230-231 (D. Haw. 1977) ("The *Pullman* doctrine requires a federal court to consider abstaining from decision in order to avoid unnecessary conflict with state policies whenever a federal constitutional issue may be avoided or presented in a different posture by a state court determination of an issue of relevant state law . . . . Only if the state statute is 'fairly susceptible' to a construction which avoids or limits the constitutional question is abstention appropriate.")

Clearly, if a state statute is ambiguous or vague or nonspecific in the terms of its operation or application, and is susceptible to a constitutional interpretation by the state courts, this Court not only may abstain, but must abstain.

In *Nehring*, *supra*, this Court expounded upon the two views held by the United States Court regarding the *Pullman* doctrine of abstention. This Court noted that two distinct factual situations exist for abstention:

> In this case, it is helpful to consider two different factual situations which may call for abstention. First, a state statute may be ambiguous, with one possible construction of the statute avoiding or substantially limiting

> the federal constitutional question. Alternatively, a clear statute may possibly violate an unconstrued state constitutional provision. If the state constitutional provision nullifies the statute, there is no need to reach the federal question. *Nehring, supra* at 231.

This Court then discussed the cases of *Reetz v. Boganich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970)[5] and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) and noted the existing dichotomy:

> The Court seems to have set up a dichotomy, albeit an unarticulated one, based upon the nature of the state constitutional issue which could be raised. If the state claim is merely the local equivalent of an important federal right then abstention is unnecessary. *On the other hand, if the state claim extends to an interest primarily protected by the individual state's authority, particularly in a case involving a complex statutory and constitutional scheme, a federal court should allow the state courts to resolve the case in the first instance. . . . Nehring, supra* at 233. (Emphasis added.)

This interpretation was based upon the distinction expressly noted by this Court quoting *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84-85, 95 S.Ct. 870, 875, 43 L.Ed.2d 32 (1975).

> In [*Constantineau*], we declined to order abstention where the federal due process claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution. *But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district court to abstain.* (citing *Reetz*) . . . . *Nehring, supra* at 233. (Emphasis added.)

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5 The Court, in *Reetz* ordered abstention because ". . . the nub of the whole controversy may be the state constitution," 397 U.S., at 87.

Clearly, this action falls within the distinction noted by the Supreme Court. We have as will be described *infra*, an integrated scheme of related constitutional provisions, statutes and regulations. Furthermore, as will be shown, this scheme as a whole, requires a clarifying interpretation by the courts of the State of Hawaii.

Therefore, Defendants submit that abstention is appropriate.

* * *

Intervenors' Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION, INC., and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

[Filed by Intervenors Kahala Community Association *et al.* on April 20, 1979]

* * *

VII. CONCLUSION.

Plaintiffs simply have not met the standards required for issuance of a preliminary injunction. They have failed to demonstrate truly irreparable injury. Moreover, any inconvenience to plaintiffs if arbitrations proceed is more than outweighed by the damage that will flow to lessees by further delaying procedures that, due to stringent procedural safeguards, are already extremely time consuming.

Nor is there any real likelihood plaintiffs will prevail on the merits. Their arguments concerning public purpose are rendered untenable by the legislative findings and the substantial case law in the area. Insofar as valuation formulas are concerned, no constitutional problems arise if these are read as guidelines rather than ironclad limitations on what compensation may be awarded by the condemnation court. The valuation date set by Chapter 516 is simply a matter of procedure. Furthermore, it appears that Hawaii courts will require payment of interest from the designation date to the date of judgment, thereby compensating lessor for any loss of appreciation after the designation date.

So far as arbitration procedures are concerned, plaintiffs have presented nothing that compels the conclusion that such procedures are unconstitutional. Not only are these procedures well recognized methods for resolving disagreements concerning real estate values, but the panel's award is nothing more than prima facie evidence for use in the condemnation trial.

Finally, the fact that arbitration precedes designation does not render the procedure either unworkable or unconstitutional. The arbitration panels will certainly be able to devise methods to adjust valuations to future dates, and the lessor and lessee will have ample opportunity to demonstrate at trial or on appeal any error in that regard.

Accordingly, KCA submits that plaintiff's motion should be denied.

DATED: Honolulu, Hawaii, April 20, 1979.

Intervenors' Opposition to Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

Hearing Date: April 24, 1979

FRANK E. MIDKIFF, et al.,

Plaintiffs,

v.

PAUL A. TOM, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

[Filed by Intervenors Wai-Kahala Tract "H" Ass'n *et al.* on April 23, 1979]

* * *

XI. CONCLUSION

Due to history and geography, in 1967 when the original Hawaii Land Reform Act was passed the Hawaii Legislature was faced with a unique situation. In 1967, and later in 1975, the Legislature expressly found that the peculiar Hawaiian system of residential leaseholds had undesirable social and economic effects, and was part of the broadest problems, such as inflation, facing the State as a whole.

The Legislature chose not to adopt a statute implying a private option to purchase the fee in residential leaseholds, or to utilize other governmental powers such as those of taxation or regulations to address these problems of public concern. Instead, the Legislature made the decision to employ the

mechanism of eminent domain, with its corresponding requirement of just compensation, to effectuate its public purposes in attacking these problems. This rational Legislature's perception of problems of public concern, and the mechanism chosen to confront these problems, should not be upset by this court, which cannot substitute its own judgment for that of the Legislature. To state that the Hawaii Land Reform Act represents the exercise of the governmental power of eminent domain solely for "private use" is to deny history, geography, and local reality.

Given the public purposes, and thus "public use," behind the exercise of eminent domain embodied in the Hawaii Land Reform Act, mere speculation and supposition as to how this Act will be applied by State courts in the exercise and their judicial duties must be rejected. Plaintiffs' Motion for a Preliminary Injunction against the Hawaii Land Reform Act must be denied.

DATED: Honolulu, Hawaii, April 23, 1979.

Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

PRELIMINARY INJUNCTION

[Filed in the United States District Court,
District of Hawaii, June 8, 1979]

This cause came on for hearing on Plaintiffs' Motion for Preliminary Injunction on April 24-27, 1979, and the Court having considered the Verified Complaint, the memoranda and affidavits submitted in support of the motion and in opposition thereto, and having heard oral evidence and received documentary evidence in open Court upon hearing of the motion, and the Court having made and filed on May 8, 1979, its Decision on the Motion for Preliminary Injunction, setting forth the Court's findings and reasons,

IT IS HEREBY ORDERED that Defendant Hawaii Housing Authority, its commissioners, officers, agents, servants, em-

ployees and attorneys, and all persons in active concert and participation with it be, and hereby are, restrained and enjoined, pending entry of final judgment following a trial on the merits of Plaintiffs' Verified Complaint, from and against:

(1) effectuating its order communicated to Plaintiffs by letter dated January 22, 1979, to commence mandatory arbitration pursuant to Hawaii Revised Statutes Chapter 516, Part IIA with respect to their residential leasehold lots located in Waialae-Kahala Subdivision Tract H, Oahu, Hawaii; and

(2) ordering any mandatory arbitration pursuant to or under the purported authority of Hawaii Revised Statutes Chapter 516, Part IIA, in regard to any other development tract or leasehold residential lots;

(3) confining the methods to be used for determining "owner's basis" to the two methods set forth in Section 516-1 (14) (A) and (B), Hawaii Revised Statutes;

PROVIDED that Plaintiffs first give security in the sum of ten thousand dollars ($10,000) for the payment of such costs and damages as may be incurred or suffered by any party who is found upon final determination of this action to have been wrongfully enjoined.

IT IS FURTHER ORDERED that provisions for negotiations under Hawaii Revised Statutes Chapter 516, Part IIA, and that provisions outside of Hawaii Revised Statutes Chapter 516, Part IIA, specifically designation and commencement of condemnation proceedings, are not enjoined under this preliminary injunction.

DATED: Honolulu, Hawaii, June 8, 1979.

/s/ SAMUEL P. KING
United States District Judge

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court,
District of Hawaii, September 18, 1979]

Defendants WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al. (hereinafter referred to as "WAI-KAHALA") respectfully move this court for Partial Summary Judgment. As a matter of law, this court should hold that the legislative findings, specifically HAW.REV.STAT. § 516-83, establish a proper constitutional basis for the Hawaii Land Reform Act.

This Motion for Partial Summary Judgment is made pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Memorandum in Support of Motion for Partial Summary Judgment, Affidavits of John Hulten and I. Nelson Rose, and verified copy of the legislative findings attached hereto, the

pleadings and files herein, and incorporating by reference the Memoranda filed by Defendants Kahala Community Association, Inc., et al., and Defendant State of Hawaii on August 3, 1979, and the legislative history and statutes previously introduced as evidence.

DATED: Honolulu, Hawaii, September 18, 1979.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. *Statement of Facts*

Plaintiffs have filed suit challenging the constitutionality of the Hawaii Land Reform Act, Chapter 516, Hawaii Revised Statutes. Plaintiffs allege that the Hawaii Land Reform Act unconstitutionally deprives Plaintiffs of their property by improper exercise of the power of eminent domain (see Section III of Plaintiffs' verified complaint). In part, Plaintiffs allege that Chapter 516 is unconstitutional because the legislative findings do not and cannot support the use of eminent domain (see paragraph 14 (c) of Plaintiffs' verified complaint).

In enacting and amending the Hawaii Land Reform Act, the Hawaii State Legislature incorporated extensive legislative findings and declarations of necessity and purpose. HAW.REV.STAT. § 516-83. The Legislature recognized that the concentration of land ownership in the State of Hawaii and the corollary refusal of these large landholding estates to sell their urban residential property has adversely affected the health, welfare, security and happiness of the people of the State of Hawaii. Specifically, the Legislature has declared that the residential leasehold situation has contributed to the shortage of residential fee land, the artificial inflation of land prices, the increasing cost of living, possible future economic instability and disruption, and therefore justifying the use of eminent domain by the State of Hawaii.

While representing that they will attack the legislative findings, Plaintiffs have not and will not specify what particular findings they will challenge.

In order to narrow the actual issues to be adjudicated at trial, Defendant WAI-KAHALA now moves for Partial Summary Judgment asserting as a matter of law that (1) there is a strong presumption for constitutional validity in the instant case; (2) the burden is on Plaintiffs to affirmatively disprove all these legislative findings and establish that the Legislature acted arbitrarily and capriciously; and (3) there is a reasonable basis for these legislative findings sufficient to protect them from constitutional attack.

* * *

[Exhibit and Affidavits omitted in printing]

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court,
District of Hawaii, September 27, 1979]

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., move this Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, upon the following issues:

1. The legislative findings of Chapter 516, Hawaii Revised Statutes, are supported by fact;

2. The use of the eminent domain process as contemplated by Chapter 516, Hawaii Revised Statutes, is reasonable, necessary, and appropriate; and

3. The exercise of the power of eminent domain pursuant to Chapter 516, Hawaii Revised Statutes, is for a public purpose.

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., join in the Motion for Partial Summary Judgment filed herein by WAI-KAHALA TRACT "H" ASSOCIATION, INC., and incorporate by reference the affidavits and memorandum filed therewith.

This Motion is based upon the Motion for Partial Summary Judgment and its affidavits and memorandum filed as aforesaid, together with the pleadings filed herein and the memorandum filed herewith.

DATED: Honolulu, Hawaii, September 27, 1979.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant-Intervenors, PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC. ("Defendants"), join in the Motion for Partial Summary Judgment filed by Defendant-Intervenors, WAI-KAHALA TRACT "H" ASSOCIATION, INC., ("WAI-KAHALA"), and, additionally, seek summary judgment on the related issues of (1) whether the use of the eminent domain process under Chapter 516 is reasonable, necessary, and appropriate; and (2) whether the exercise of the power of eminent domain pursuant to Chapter 516 is for a public use. These additional issues are presented because the granting of the Motion for Partial Summary Judgment filed by WAI-KAHALA will be dispositive of these two additional issues.

* * *

Conclusion

The necessity, expediency, location, and extent of taking property for a public purpose are legislative and administrative questions and are not subject to judicial review absent fraud, bad faith, or abuse of discretion on the part of the Legislature. The Plaintiffs have not raised any such issues by their pleadings, nor does the record reflect any evidence giving rise to a legitimate issue of fraud, bad faith, or abuse of discretion on the part of the legislature.

Moreover, through judicial notice and the presumption in favor of upholding legislation, there is no legitimate issue of fact as to the basic facts underlying the legislative finding of a public use or purpose. At the most, the Plaintiffs can raise only an issue which is debatable. Debatable issues must be resolved in favor of upholding the legislation; and therefore, summary judgment must be granted to Defendants on these issues.

DATED: Honolulu, Hawaii, September 27, 1979.

State Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN INTERVENORS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDA IN SUPPORT OF MOTIONS

[Filed in United States District Court,
District of Hawaii, October 19, 1979]

Come now Defendants by and through their attorneys, WAYNE MINAMI, Attorney General, R. BRIAN TSUJIMURA and ALLAN G. KAWADA, Deputy Attorneys General, and YUKIO NAITO, Special Deputy Attorney General, State of Hawaii, and hereby join in the Motions for Partial Summary Judgment and Memoranda in support thereof brought by Intervenors WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al., and PORTLOCK COMMUNITY ASSOCIATION, KOKOHEAD COMMUNITY LEASE-FEE, INC., WEST MARINA COMMUNITY ASSOCIA-

TION and HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC., filed in the above-entitled action on September 18, 1979 and September 27, 1979, respectively.

DATED: Honolulu, Hawaii, October 18, 1979.

Intervenors' Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTIONS FOR PARTIAL SUMMARY JUDGMENT

[Filed in United States District Court, District of Hawaii, October 24, 1979]

Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund hereby join in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Wai-Kahala Tract "H" Association, Inc., et al., on September 18, 1979, and in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Portlock Community Association et al. on September 27, 1979.

DATED: Honolulu, Hawaii, October 24, 1979.

Intervenors' Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff,

vs.

PAUL A. TOM, et al.,

Defendants,

and

KAHALA COMMUNITY ASSOCIATION, INC., and KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND,

Defendant-Intervenors.

MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF CLAIMS AND ENTRY OF FINAL JUDGMENT

[Filed in the United States District Court, District of Hawaii, February 19, 1980]

Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund move for partial summary judgment on the issues of whether the condemnation provisions of Chapter 516, Haw. Rev. Stat., constitute impairment of contract or an impermissible delegation of eminent domain powers, for dismissal as nonjusticiable of claims premised on Article 3 of the Hawaiian Admissions Act,

dismissal without prejudice of claims that § 516-26, and §§ 516-61 through 516-70 unconstitutionally impair the obligation of contracts, and for entry of final judgment incorporating these and the prior rulings of this Court.

This motion is based upon Rule 56(b), Federal Rules of Civil Procedure, the record and file herein, and the attached Memorandum in Support of Motion.

DATED: Honolulu, Hawaii, February 19, 1980.

[Memorandum in Support omitted in printing]

Intervenors' Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

and

WAIKAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in the United States District Court, District of Hawaii, March 11, 1980]

Defendant-Intervenors Wai-Kahala Tract "H" Association, Inc., et al., hereby join in the Motion for Partial Summary Judgment filed herein by Defendant-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund on February 19, 1980.

DATED: Honolulu, Hawaii, March 11, 1980.

State Joinder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

JOINDER IN MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed in United States District Court, District of Hawaii March 27, 1979]

Defendants, PAUL A. TOM, et al. (State Defendants) hereby join in the Motion for Partial Summary Judgment filed herein by Defendants-Intervenors Kahala Community Association and Kahala Community Association Fee Purchase Fund on February 19, 1980.

DATED: Honolulu, Hawaii, March 27, 1980.

Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,
Plaintiffs,

vs.

PAUL A. TOM, et al.,
Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,
Intervenors.

FINAL JUDGMENT AND PERMANENT INJUNCTION

[Filed in the United States District Court,
District of Hawaii, June 10, 1980]

The Court having filed its Decision on Motion for Preliminary Injunction on May 8, 1979 and its Amended Memorandum Decision on December 19, 1979,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the mandatory arbitration provisions of Hawaii Revised Statutes Chapter 516, Part IIA and the provisions of Hawaii Revised Statutes § 516-1(14) prescribing the methods to be used in determining just compensation are unconstitutional. Defendant Hawaii Housing Authority, its commissioners, offi-

cers, agents, servants, employees and attorneys, and all persons in active concert and participation with it be, and hereby are, permanently restrained and enjoined from and against:

(a) ordering or effectuating any mandatory arbitration pursuant to or under the purported authority of Hawaii Revised Statutes Chapter 516, Part IIA, in regard to any development tract or leasehold residential lots; and

(b) effecting any taking in which the compensation to be paid is limited by the methods set forth in Hawaii Revised Statutes § 516-1(14).

2. The TEN THOUSAND DOLLARS ($10,000) posted by Plaintiffs, as security for the payment of costs and damages as a condition of issuance of the Preliminary Injunction filed June 8, 1979, and the sum of ONE HUNDRED DOLLARS ($100) posted by Plaintiffs, as security for costs and damages as a condition of issuance of the Temporary Restraining Order filed February 28, 1979, shall forthwith be returned to Plaintiffs.

3. Issues raised by the Complaint concerning Hawaii Revised Statutes § 516-24 (second sentence), § 516-26 and §§ 516-61 through 516-70 are not ripe for review, and as to these issues the complaint is dismissed without prejudice.

4. Plaintiffs' claims premised on Article 3 of the Hawaiian Admissions Act are nonjusticiable and accordingly will be dismissed with prejudice.

5. The Court notes that it has not specifically ruled on the following motions:

(a) April 6, 1979 Motion to Take Judicial Notice;

(b) April 18, 1979 Motion to Compel Discovery and Impose Sanctions;

(c) April 19, 1979 Motion to Compel Production of Documents;

(d) April 20, 1979 Appeal of Magistrate's Order Denying Plaintiffs' Motion to Compel Discovery;

(e) April 20, 1979 Motion in Limine;

(f) August 3, 1979 Motion for Order Declaring Certain Facts Be Taken as True; and

(g) November 26, 1979 Motion to Compel Discovery and Impose Sanctions.

Some of the issues raised by these Motions may have been decided *sub silentio* by previous decisions of this Court. To the extent that issues raised by these Motions have not been decided *sub silentio*; and to the extent that such issues are not *specifically* covered by this Order; the Court considers such issues either not ripe for adjudication, or such that they need not be decided.

6. On all other issues raised by the Complaint and not disposed of above, judgment is granted in favor of Defendants and Defendant-Intervenors, and against Plaintiffs.

7. All parties shall bear their own costs.

DATED: Honolulu, Hawaii, June 10, 1980.

/s/ SAMUEL P. KING
United States District Judge

Plaintiffs' Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs,

vs.

PAUL A. TOM, et al.,

Defendants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors.

NOTICE OF APPEAL

[Filed in the United States District Court,
District of Hawaii, July 9, 1980]

Notice is hereby given that FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from Paragraphs 4 and 6 of the Final Judgment and Permanent Injunction entered in this action on the 10th day of June, 1980.

DATED: Honolulu, Hawaii; July 9, 1980.

Intervenors' Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

U.S. District Court
District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees,

BRIEF FOR PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE INC.; WEST MARINA COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC. AS INTERVENOR-APPELLEES

[Filed January 20, 1981]

* * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does the use of the State's power of eminent domain under the Hawaii Land Reform Act for condemnation of lessors' interests in residential houselots comport with due process of law?

II. Do the legislative findings set forth in the Land Reform Act and the supporting legislative history provide a constitutional justification for the exercise of the taking power?

III. Was the Motion for Summary Judgment in favor of the Defendants providently granted by the Federal District Court?

IV. Is the Land Reform Act constitutional under the Contracts Clause contained in Article I, § 10 of the U.S. Constitution?

* * *

Intervenors' Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

USDC Civil No. 79-0096

On Appeal From the United States District Court
for the District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees,

ANSWERING BRIEF OF DEFENDANT-INTERVENOR-APPELLEES KAHALA COMMUNITY ASSOCIATION, INC. AND KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND

[Filed February 23, 1981]

I. *QUESTIONS PRESENTED*

A. Are Chapter 516 Condemnations for a Public Use?

B. Does Chapter 516 Deny Substantive Due Process?

C. Did the District Court Err in Granting Summary Judgment?

D. Does Chapter 516 Violate the Contracts Clause?

• • •

Intervenors' Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

Brief for Appellees

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—VS.—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees.

INTERVENOR-APPELLEES, WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LANDSALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC. KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, AND WAIAU COMMUNITY ASSOCIATION

BRIEF FOR INTERVENOR-APPELLEES

[Filed February 23, 1981]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Do The Legislative Findings Provide A Constitutional Base For The Hawaii Land Reform Act?

A. Was The District Court correct in ruling that the legislative did not act arbitrarily?

B. Was the District Court correct in granting Defendants' motions for summary judgment, thus precluding Plaintiff-Appellants from contesting each and every one of the legislative findings in a full trial?

II. Is the Hawaii Land Reform Act constitutional?

A. Was the District Court correct in ruling that the Act fulfills a public purpose?

B. Was the District Court correct in ruling that the Act did not violate the Contract Clause of the U.S. Constitution?

* * *

State Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 80-4368

U.S. District Court, District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants, Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

[Filed February 24, 1981]

Paul A. Tom, et al., the commissioners and executive director of the Hawaii Housing Authority, and Hawaii Housing Authority respectfully submit their Answering Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the taking of fee simple title of lessors of leasehold residential lots by eminent domain and the subsequent sale of the fee title to the lessees of the lots a taking for a public use, where such taking and sale are for the purpose of dispersing the fee simple ownership of residential lots, otherwise held by a

few large landowners, to as many people as possible and for the achievement of other legislatively stated social and economic goals.

2. Is the use of the power of eminent domain appropriate and reasonable to cure the problems of concentration of fee simple ownership of land in a few landowners, the shortage of the fee simple residential lots, and other undesirable social and economic conditions found by the Legislature to exist.

3. Did the District Court properly grant summary judgment against the Trustees when, based on commonly known facts about landownership and shortage of fee simple residential lots in Hawaii and on legislative findings and declaration of purpose, the Court was able to conclude that the Legislature acted rationally and not arbitrarily in enacting Chapter 516.

4. Does the fact that the exercise of eminent domain under Chapter 516 results in the termination of existing leasehold contracts between the Trustees and their lessees violate the Contract Clause of the Federal Constitution.

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Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Re: *Midkiff v. Tom*, No. 80-4368

USDC Civil No. 79-0096

BRIEF OF DEFENDANT-INTERVENOR-APPELLEES KAHALA COMMUNITY ASSOCIATION AND KAHALA COMMUNITY ASSOCIATION FEE PURCHASE FUND ON ABSTENTION

[Filed Nov. 3, 1981]

Introduction

This letter is written pursuant to the court's request for additional briefing concerning case or controversy requirements and abstention issues.

Defendants-intervenors-appellees Kahala Community Association and Kahala Community Association Fee Purchase Fund ("KCA") submit that examination of the authorities and the record in this case establish the following:

1. Throughout this case there has been a case or controversy concerning the constitutional issues present in this appeal.

2. *Pullman*-type abstention is improper in this case because there is no state law issue that will preclude the necessity of resolving the federal constitutional issues. Furthermore, application of *Pullman*-type abstention procedures would seriously frustrate state policies concerning disposition of eminent domain actions.

3. *Burford*-type abstention is improper because the federal constitutional issues here are clearly severable from any non-federal issues.

4. *Younger*-type absention is inapplicable to this case based upon existing case law. The obstacle posed by existing cases is the apparent requirement that state court

proceedings be commenced before substantial proceedings in the federal case. Here, no condemnation action was filed until long after the court's preliminary injunction rulings. KCA submits that although this case might be brought within an abstention doctrine by logical extension of cases subsequent to *Younger*, such extension would be appropriate only to avoid a reversal of the district court on the grounds the statute is unconstitutional. In other circumstances, there is no practical prospect of interference with state policies or pending proceedings, and hence no need to consider extension of *Younger* principles.

Status of Pending Condemnation Actions

To place following discussion in context, it is first necessary to discuss the status of state condemnation actions.

At the time this suit was filed, no condemnation actions had been filed. Chapter 516 and implementing administrative regulations precluded the filing of condemnation actions until various administrative steps were completed. One of these steps was arbitration of values. Bishop Estate filed the complaint after it was ordered into arbitration.

The complaint sought to enjoin not just arbitration, but all administrative proceedings under Chapter 516, primarily on the ground that the underlying statute was unconstitutional.

A temporary restraining order was issued that precluded the Hawaii Housing Authority ("HHA") from issuing or enforcing arbitration orders, or from taking any subsequent steps toward condemnation.

The court issued a preliminary injunction decision in May 1979, holding that the trustees were unlikely to prevail on the public use issue. But the court did hold that mandatory arbitration provisions were unconstitutional and enjoined such proceedings. It also questioned the constitutionality of certain "owner's basis" provisions, but issued no injunction on that issue.

Entry of the preliminary injunction freed the HHA to proceed with administrative steps that were preliminary to condemnation. However, it took several months for completion of those proceedings. The first condemnation actions

(involving subdivisions known as Tracts A, C and H) were filed on September 21, 1979—three days after filing of the first summary judgment motion in this case. In those actions, as in all subsequent actions, the HHA was the plaintiff, and both Bishop Estate and the lessees were named as defendants.

The Tract A, C and H actions were settled by a negotiated sale of lots, as was one subsequent action involving KCA lessees. Numerous other actions are now pending. At present, KCA attorneys are representing lessee defendants in six state court condemnation actions and representing six other community associations in administrative proceedings that are preliminary to institution of condemnation actions.

Following the district court's rulings, the Hawaii Legislature in 1980 amended Chapter 516 to remove provisions requiring arbitration and to amend the "owner's basis" definition. These amendments effectively eliminated the constitutional infirmities identified in the district court's preliminary injunction decisions and final judgment.

No condemnation action has yet been tried. However, at least two state judges have issued orders holding that Chapter 516 condemnations are for a public use. One such order (copy attached) was entered by Judge J. H. Wakatsuki in *Hawaii Housing Authority v. James C. Castle, et al.*, Civil No. 62181, Circuit Court of the First Circuit, State of Hawaii. A similar order was entered by Judge Arthur S. K. Fong in *Hawaii Housing Authority v. Midkiff, et al.*, Civil No. 60465, Circuit Court of the First Circuit, State of Hawaii. That order (furnished to this court by KCA's letter of October 21) held that Chapter 516 was for a public purpose and was constitutional under both the United States Constitution and the Hawaii Constitution. In both such orders, the courts took judicial notice of *Midkiff v. Tom* but did *not* premise the orders on *res judicata*.

Civil No. 62181 involved a lessor other than Bishop Estate, and Civil No. 60465 has been, or will shortly be, settled and dismissed. KCA submits, however, that at a minimum these decisions show that state judges are reaching the same constitutional conclusions as those rendered by Judge King.

A case or controversy has existed at all relevant times.

As previously noted, this suit was filed before the HHA had completed all the administrative steps that are prerequisites to filing a condemnation action. The full panoply of steps required by statute and regulation to begin a condemnation action is summarized in KCA's Preliminary Injunction Memorandum, CR 101 at 4-7.

In overview, HHA first must review lessee applications to determine preliminarily whether statutory eligibility requirements have been met. The HHA then holds public hearings and makes a preliminary determination as to whether acquisition of the tract will further the purposes of Chapter 516.

If such a finding is made, the next steps directly affect the lessor: the HHA requests lessor and lessees to negotiate the value of the fee interests. (Section 516-68, Hawaii Revised Statutes, further requires the parties to bargain in good faith.) Under the version of the statute in force at time of trial (but since amended), if these negotiations failed the parties were required to submit to mandatory arbitration of values. Once arbitration was completed, HHA was permitted to designate the tract for acquisition. Designation was (and is) a prerequisite to condemnation actions. Under the prior statute, the arbitration results were to be used as prima facie evidence of value in any ensuing condemnation proceeding.

Bishop Estate initiated this suit when HHA ordered it to arbitrate values in the first tract that completed pre-arbitration procedures. Through the preliminary injunction hearing, HHA was completing the steps preliminary to statutory negotiation and arbitration of interests in thousands of other Bishop Estate leases. (See testimony of HHA official K. Kohatsu, 4/24/79 RT at 236-46).

The complaint sought to enjoin *any* proceedings by the HHA under Chapter 516 pertaining to Bishop Estate's numerous subdivisions. The complaint (CR 1) quite clearly sought to halt every action by HHA, from the initial acceptance of leesses' purchase applications to the actual filing of condemnation suits.

Both in the complaint and in subsequent proceedings seeking a preliminary injunction, plaintiffs contended that the HHA should be enjoined from taking any steps pursuant to Chapter 516 on the grounds that the entire statute constituted an unconstitutional violation of the public use requirement. In its effort to halt all HHA proceedings, Bishop Estate briefed the public use issue extensively in preliminary injunction memoranda (CR 2 at 10-22, CR 112 at 4-8), and argued vigorously at the preliminary injunction hearing that the statute was facially unconstitutional. (4/24/79 RT at 415-422).

Thus, in order to rule on plaintiff's request to enjoin all HHA proceedings, either preliminarily or permanently, the court was forced to confront the threshold issue of whether Chapter 516 was premised upon a valid public purpose. The court indeed addressed that issue in its preliminary injunction decision, determining that the act was probably constitutional.

The constitutional issues, of course, remained for final decision at the time of ruling on plantiff's request for a permanent injunction and judgment. By that point, only one additional consideration was involved. At the preliminary injunction hearing, the parties stipulated that the court could take legislative findings as true in evaluating the public use issue. However, plaintiff's complaint alleged the legislative findings were erroneous.

In September 1979, lessees sought summary judgment on the public use issue, relying primarily upon the presumptions of constitutionality and regularity which attach to legislative acts and findings. Plaintiffs responded with affidavits that did not meet the requirements of Rule 56. Further, they stated in a memorandum (CR 140 at 13-14) that they would not seek to disprove all legislative findings, but only intended to present evidence that the legislature's theories regarding inflation were erroneous. These materials fell far short of showing that the legislative facts could not reasonably be conceived to be true by the legislature. Since legislative acts are presumptively constitutional, and since states are not required to present current empirical proof that legislative findings are correct (*Vance v. Bradley*, 440 U.S. 93, 110-111 and n. 28 (1979); *Barry v.*

Barchi, 443 U.S. 55, 68 (1979); *see Minnesota v. Clover Leaf Creamery*, 66 L. Ed. 2d 659, 668-69 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978)) the court proceeded to grant summary judgment.

The court's ruling on the constitutional validity of Chapter 516 was thus in no sense an anticipatory ruling on defenses to be advanced in condemnation actions. Bishop Estate's constitutional arguments were advanced in an effort to halt all the administrative proceedings in which Bishop Estate and lessees were then embroiled. A determination of the constitutional validity of Chapter 516 was essential to resolution of those claims and, as illustrated by the activity of all parties, these issues were the subject of vigorous controversy.

Pullman-*type abstention is inapplicable to this case*

KCA submits that *Pullman*-type abstention is clearly inapplicable to the present case.

This court has repeatedly stated that there are three requirements for *Pullman*-type abstention:

> 1. The complaint must touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> 2. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> 3. The possibly determinative issue of state law is doubtful.

Isthmus Landowners Association v. California, 601 F.2d 1087, 1091 (9th Cir. 1979); *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976).

The second and third requirements are clearly not satisfied here.

Bishop Estate has filed identical answers in each case in which KCA lessees are involved. Those answers assert that Chapter 516 violates the federal constitution and Article I,

Sections 5 and 20 of the Hawaii Constitution dealing with due process, equal protection and public use. They also claim that HHA has not complied with its own rules in initiating the condemnations.

The state constitutional claims involve provisions that are mirror images of federal constitutional provisions. Such state claims afford no basis for *Pullman*-type abstention. *Pue v. Sillas*, 632 F.2d 74, 80-81 (9th Cir. 1980).

Nor is Pullman abstention authorized in this case by reason of claims of administrative error. In the state actions, defendant has never identified any specific claimed error. More importantly, any finding that administrative error occurred as to one suit would, as a practical matter, simply result in additional administrative proceedings. Once any procedural deficiencies are corrected the constitutional issues will remain.

In short, there is no perceivable state issue that could possibly make it unnecessary to confront the constitutional questions. As noted above, unless it is clear that there is a doubtful state law issue that could render unnecessary a decision of the federal constitutional question, *Pullman* abstention is impermissible.

KCA recognizes that in the *Isthmus Landowners Association*, *Sederquist* and *Rancho Palos Verdes* cases, this court directed *Pullman* abstention in cases involving land regulation. The fact that land is involved here creates a superficial similarity to those decisions. But they differ dramatically from this case in that each involved assertions that a particular land use action by local government or commission involved an improper taking without compensation. At issue in each case was whether agencies had exceeded regulatory powers conferred by state law with respect to specific parcels. Here, by contrast, the law quite clearly authorizes the HHA to exercise eminent domain power with respect to residential leaseholds.

There are two other reasons why *Pullman*-type abstention is inappropriate. First, as the court recognized in *Pue* (632 F.2d at 78), a decision to abstain involves the exercise of discretion, which will be disturbed only upon a clear error of judgment in weighing the relevant factors. *Id.*

In this case, the State of Hawaii's Memorandum in Opposition to Motion for Preliminary Injunction (CR 96 at 82-103), urged that the court abstain. As the case then stood, that argument was viable. The State's abstention suggestion was addressed to the arbitration and owner's basis provisions of the statute. The State took the position that these provisions were subject to a limiting construction that could alter the constitutional issues before the court. Although the State also suggested the court should abstain as to public use questions, it never suggesed that limiting constructions were available and did not seriously press that argument.

In any event, Bishop Estate filed a memorandum opposing abstention (CR 113) and the district court failed to abstain as to any issues. While the court's decision to proceed to the federal constitutional issues was perhaps arguable so far as unconstrued arbitration and valuation issues are concerned, those issues have been mooted by the legislature's amendment of the statute. So far as the public use question was concerned, no one ever suggested a state law construction that could moot the federal issues. In light of the express legislative declaration that Chapter 516 condemnations are for a public use, it is difficult to perceive how failure to abstain on that issue could possibly constitute an abuse of discretion.

The third reason *Pullman*-type abstention is inappropriate in this case is that procedural ramifications of *Pullman* would frustrate basic state policies concerning eminent domain actions.

When abstention is ordered on *Pullman* grounds, a plaintiff is permitted to preserve constitutional issues for federal court adjudication pending resolution of state court issues. In light of the fact that Bishop Estate has raised constitutional issues as affirmative defenses in pending condemnation actions, it is questionable whether reservation is permissible at this point. But if reservation were permitted, the effect would be to frustrate a carefully drawn state procedure for carrying out eminent domain actions in an orderly and expeditious fashion.

It is self-evident that the constitutional question of public use may be involved in any eminent domain proceeding.

Hawaii's policy is to encourage resolution of any public use questions before trial of valuation and other issues. To that end, Section 101-34, Hawaii Revised Statutes, provides that any party to a condemnation action may request and obtain an immediate trial on any public use issue, and further provides an interlocutory appeal as of right from the result of that trial. Moreover, Section 101-34 provides that such appeals shall be given precedence in the Hawaii Supreme Court.

Thus, Hawaii has established a procedure to encourage resolution of public use issues prior to adjudication of compensation issues. The practical desirability of such a procedure is obvious. An application of *Pullman*-type abstention would totally frustrate that policy. It would, in effect, require that state courts resolve all other issues, and then wait for a federal court to determine the public use question. This is exactly the type of interference with on-going proceedings that *Burford* and *Younger* abstention doctrines are designed to avoid. They are discussed below.

Burford abstention is inapplicable.

Burford abstention requires little discussion. The Ninth Circuit has found few situations in which that doctrine applies. *International Brotherhood of Electrical Workers v. Public Service Commission*, 614 F.2d 206 (9th Cir. 1980), is illustrative. That court noted (*Id.* at 211) that *Burford* "permits a court to decline to adjudicate an essentially local issue arising out of a complicated state regulatory scheme." But the court pointed out that the Ninth Circuit has refused to apply *Burford* if either of two factors exist. First, the court stated that *Burford* abstention is inappropriate if federal issues can easily be severed from any state law issues with respect to which state courts may have special competence. Second, application of *Burford* turns upon whether or not the state, in order to produce uniformity of decision, has given a single tribunal authority to hear all such suits.

Here, it is self-evident that remaining federal questions are easily separable from any state issues. No party has ever suggested otherwise. Furthermore, condemnation actions are

not confined by Chapter 516 to any particular court, although all actions filed to date have been in the First Circuit Court and it is likely all future actions will be heard there.

Younger-type abstention should not be applied.

The only abstention theory that arguably applies to this case is *Younger* abstention. That type of abstention, which rests upon concerns for comity and federalism, could be applied in this case by expansion of prior rulings. KCA submits that while such expansion is certainly possible on the facts of this case, it would be appropriate only if the alternative were to hold the statute unconstitutional. If the statute is upheld, there will be no conceivable further intrusion by federal courts upon state interests and hence no occasion for expansion of *Younger.*

In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that it was inappropriate for a federal court to entertain a Section 1983 action challenging a criminal statute during a criminal prosecution. The decision was based upon concerns for comity and federalism.

In the years following *Younger*, this abstention doctrine has been expanded significantly. First, the Supreme Court has held that in certain situations, *Younger* abstention principles apply to civil actions that implicate important state interests. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court held that *Younger* principles applied to civil nuisance proceedings involving obscenity. The Court noted that case was "akin to a criminal prosecution". *Id.* at 604. Similar results were reached in *Juidice v. Vail*, 430 U.S. 327 (1977), and *Trainor v. Hernandez*, 431 U.S. 434 (1977). *Vail* involved the state's interest in its civil contempt process. The *Vail* Court said that federal court interference with the contempt process was likely to be as offensive to the state's interest as if a criminal proceeding were involved. 430 U.S. at 334. *Trainor* involved a civil action to recover fraudulently obtained welfare payments. The *Trainor* Court said that *Younger* and *Huffman* "are broad enough to apply to interference by a federal court with an on-going civil enforcement action such as this brought by the state in its

sovereign capacity". 431 U.S. at 444. Finally, in *Moore v. Sims*, 442 U.S. 415 (1979), the Court held that *Younger* principles applied where the state had brought an action for temporary custody of children believed to have been abused. The *Moore* Court said the *Younger* and *Huffman* concern—"that threat to our federal system posed by displacement of state courts by those of the National Goverment—is also applicable to civil proceedings in which important state interests are involved". *Id.* at 123. This broad language was possibly qualified by the Court's observation that the *Moore* case, like *Huffman*, was "in aid of and closely related to criminal statutes". *Id.*

In the Ninth Circuit, *Kinney v. Lenon*, 447 F.2d 596 (9th Cir. 1971) held that *Younger* non-intervention policies required abstention from claims involving the right to bail during state juvenile proceedings. Then, in *Williams v. Washington*, 554 F.2d 369 (9th Cir. 1977), the court held that the basic *Younger* principle required abstention where the state had initiated civil proceedings to rectify violations of its consumer protection act. In *Rosenthal v. Carr*, 614 F.2d 1219 (9th Cir. 1980), the court held that federal court intervention in bar disciplinary proceedings was precluded, stating that the *Younger*, *Huffman* and *Trainor* abstention doctrine "bars a federal court from enjoining pending state court criminal or civil enforcement proceedings absent exceptional circumstances." *Id.* at 1220.

Finally, in *Worldwide Church of God, Inc. v. California*, 623 F.2d 613 (9th Cir. 1980), the court held that absent exceptional circumstances, a district court should abstain in an action challenging a receivership established by a state court. In response to arguments that the receivership was not a "pending state proceeding" and did not implicate an "important state interest", the court stated that (1) imposition of the receivership was an integral element of on-going state litigation; (2) enjoining enforcement of a receivership order would violate the principles of federalism, equity and comity referred to in *Younger*; and (3) investigation and regulation of fraud by charitable trusts is a state interest of a magnitude similar to that involved in controlling welfare fraud, as in *Trainor*, or regulating child custody, as in *Moore*. 623 F.2d at 615-16.

These cases are difficult to categorize. Perhaps the best categorization that has been achieved is the following: "The Younger rules reach to any *civil enforcement action* brought by the state *in its sovereign capacity* . . . ." 17 Wright & Miller, *Federal Practice and Procedure* § 4254 at 547 (1978) (emphasis added). That description accurately reflects the fact that in each of the above cases, state action was initiated to redress violation of statutes or court rules closely akin to criminal laws.

The present case is somewhat different in that it does not involve any violation of state law. Nonetheless, in light of the sovereign state interest involved, it is certainly conceivable to expand Supreme Court and Ninth Circuit decisions to cover federal court challenges to on-going eminent domain litigation.

That was the result reached in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). There, the court read *Huffman* as authorizing *Younger* abstention where state civil litigation is pending, at least where the federal plaintiff would have a full opportunity to raise constitutional claims in the state litigation. The *Ahrensfeld* case appears to be unique. It certainly represents an extension from existing Ninth Circuit law interpreting *Younger* abstention principles.

The second basic modification of the original *Younger* doctrine involves the requirement that a state proceeding be pending when the federal case is begun. This requirement was modified in *Hicks v. Miranda*, 422 U.S. 332 (1975), in which it was held that *Younger* abstention was appropriate so long as pending state criminal prosecutions were commenced "before any proceedings of substance on the merits have taken place in the federal court". *Id.* at 349.

The present case obviously does not satisfy the pending proceedings requirement as it has been interpreted to date. At the time the federal action was commenced, HHA was moving steadily toward its first non-friendly condemnation suits, but filing of those actions was months away. Long before the first condemnation suit was filed against Bishop Estate, the court received voluminous memoranda on constitutional questions, supervised extended discovery, held a four-day preliminary

injunction hearing and issued a preliminary injunction decision and order containing findings on the probable constitutionality of the act. These were obviously "proceedings of substance".

To meet *Younger-Hicks* "pending proceeding" principles here, the court would have to rule that sufficiently advanced administrative proceedings, which are a statutory prerequisite to a suit by the state in its sovereign capacity, constitute the equivalent of pending state civil proceedings for purposes of *Younger*. While such a holding may be warranted in this case, it certainly represents an extension of present law. Such an extension is unnecessary.

The underlying rationale of *Younger* is that principles of comity, equity and federalism should preclude a federal court from interfering with ongoing proceedings in which the state is vitally interested. Whatever interference has already occurred has been mooted by legislative amendment of Chapter 516.

At this point, the only way further interference can arise is by reversal of Judge King. At present, state and federal courts are in agreement. Judge King's decision rests in significant part upon judicial notice of a basic fact repeatedly recognized by Hawaii courts—in Hawaii, land ownership is highly concentrated and a significant amount of privately owned residential land is held in leasehold. Prior to Judge King's decision, those facts were judicially noticed in *Sawada v. Endo*, 57 Hawaii 608, 616; 516 P.2d 1291, 1297 (1977); and were amplified considerably by Judge Lum's findings in *Midkiff v. Amemiya*, Civil No. 47103, First Circuit Court of the State of Hawaii.[1]

Following Judge King's decision, two judges of the Hawaii First Circuit Court have addressed public use issues in the context of actual condemnation actions. In each case, the court took judicial notice of the same facts noticed previously by the Hawaii Supreme Court and Judge King, and proceeded to hold that Chapter 516 is for a public purpose. In light of these

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1 These findings were admitted in evidence at the preliminary injunction hearing as Exhibit D-222 (See docket sheet entries for April 24, 1979 and RT at 154, 158.) The findings also appear in this record as an exhibit to CR 39.

decisions, it is apparent that conflict between state and federal systems will arise only in the event Judge King's decision is reversed.

KCA submits that ruling Chapter 516 unconstitutional would be literally unprecedented. One of the most striking aspects of this case is that in the hundreds of pages of briefing by plaintiffs, they have yet to cite a single federal decision holding that, notwithstanding state legislative or judicial determinations of public use, a state condemnation program violated public use requirements of the federal constitution. Since such a holding in this case would constitute the only such ruling in federal jurisprudence, this court might well regard extension of *Younger* abstention principles as preferable to striking down the statute. KCA submits, however, that extending *Younger* to justify abstention from an affirmance is unnecessary from the standpoint of comity, equity, or federalism, and would ill-serve either federal or state interests.

[DATED: October 28, 1981]

State Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C. A. No. 80-4368

U.S. District Court
District of Hawaii

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—VS.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Defendants, Appellees.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-APPELLEES

[Filed Nov. 3, 1981]

STATEMENT OF THE ISSUES

This supplemental brief is in response to this Court's request for a brief on the following issues:

1. Should the District Court have abstained from ruling on the constitutionality of Chapter 516, Hawaii Revised Statutes, and allowed a determination of that issue to be made by the State court.
2. If the abstention doctrine is not invoked, was there a substantial controversy for the Court to assume jurisdiction of the case.

DEFENDANTS-APPELLEES POSITION

Defendants-Appellees Paul A. Tom et al., the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority (collectively in this brief referred to as "HHA") submit as follows:

1. Under current case law, the *Younger* doctrine is not applicable to the instant case. HHA submits, however, that Chapter 516 should not be held to be unconstitutional by this Court without providing an opportunity for the State court to rule on the issue. The abstention doctrine can logically be extended and should be so extended in the instant case on the basis of equity, comity, and federalism.

2. There was a substantial controversy in the instant case for the court below to take jurisdiction. The controversy arose on a real threat on the part of HHA to implement Chapter 516, HRS, in its entirety with respect to certain specific parcels of land owned by the Trustees.

ARGUMENTS

A. *The Abstention Issue.*

In *Younger v. Harris*, 401 U.S. 37 (1971), the United States Supreme Court held that where a state criminal proceeding under a criminal statute, the constitutionality of which is disputed, is pending against a federal plaintiff at the time his federal complaint is filed, the principles of equity, comity, and federalism preclude the issuance of a federal injunction restraining enforcement of the criminal statute, unless bad-faith enforcement of the statute or other exceptional circumstances are demonstrated. The Court said that the state court in such a case should be allowed to complete its proceeding and have the opportunity to rule on the constitutional claims of the federal plaintiff. In *Samuels v. Mackell*, 401 U.S. 66 (1971) decided on the same day as *Younger*, the Supreme Court made the abstention doctrine applicable to declaratory rulings as well as to injunctive relief.

The *Younger-Samuels* doctrine has been applied in *Hicks v. Miranda*, 422 U.S. 332 (1975) to situations where a state proceeding is filed after the filing of a federal action but before any proceeding of substance on the merits has taken place in the federal court.

The *Younger* and *Samuels* cases involved criminal statutes and pending criminal proceedings in a state court. However, the abstention doctrine has since been extended to civil statutes and to civil proceedings pending in a state court. In the view of the Supreme Court, the abstention doctrine is applicable to state civil statutes and civil proceedings that are "in aid of and closely related to criminal statutes." It thus held that abstention was proper where a state court proceeding was pending under a disputed public nuisance statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), a disputed civil contempt law, *Juidice v. Vail*, 430 U.S. 327 (1977), a disputed statute which authorized civil proceedings to seek reimbursements from and to attach the property of recipients of public assistance payments for amounts fraudulently received by such recipients, *Trainor v. Hernandez*, 431 U.S. 434 (1977), and a disputed statute concerning child abuse and child custody, *Moore v. Sims*, 442 U.S. 415 (1979).

The abstention doctrine as enunciated in *Younger* and *Samuels* and in the subsequent cases do not in the first instance appear to apply to the instant case for two reasons. *First*, no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of the Trustees' action and no such state proceeding was commenced before proceedings of substance on the merit took place in the District Court below; and *second*, the statute involved does not appear to be the kind of statute deemed to be "in aid of and closely related to criminal statutes" as to justify the application of the abstention doctrine to the instant civil case.

With respect to the first of the two reasons enumerated above, the Trustees filed their action in the District Court on February 28, 1979 (R.1). The verified complaint alleged unconstitutionality of Chapter 516, Hawaii Revised Statutes. It attacked the validity of the taking by eminent domain autho-

rized by the statute. It claimed that the taking authorized by the statute is not for a public use, and it also attacked the validity of other specific provisions of the statute, including the provisions relating to mandatory arbitration and the method of calculating "just compensation."

A preliminary injunction hearing was held on April 24-27, 1979, and a preliminary injunction was issued on June 8, 1979 (R.125). The preliminary injunction enjoined HHA from effectuating the mandatory arbitration provision and the method of calculating just compensation set forth in the statute. In the injunction order, the Court also opined that the taking by eminent domain authorized by statute was for a public purpose.

Motions for partial summary judgment on the question of the constitutionality of the taking authorized by Chapter 516, that such taking is for a public use, were filed on September 18, 1979 (R.134) and on September 27, 1979 (R.136). A hearing on the merits of the motions for partial summary judgment was held on November 14, 1979, and the Court issued its Memorandum Decision on December 13, 1979 (R.150) and an Amended Memorandum Decision on December 19, 1979 (R.152), upholding the constitutionality of the taking.

Since the filing of this case by the Trustees in the District Court below, HHA has commenced condemnation actions against the Trustees in the State court. To date some 19 cases are pending in the Circuit Court of the First Circuit, State of Hawaii. Each of the cases involve different tracts of land. The first of these condemnation actions, however, was filed on January 30, 1980 (Civil No. 60465, Circuit Court of the First Circuit, State of Hawaii). Under the holdings of the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971) and *Hicks v. Miranda*, 422 U.S. 332 (1975), it does not appear that the District Court below was precluded from proceeding to adjudicate the instant case. None of the condemnation actions filed by HHA was pending at the time of the filing of the Trustees' suit nor at the time of the District Court's decision upholding the constitutionality of Chapter 516.

With respect to the statute in question, Chapter 516 does not possess the characteristics of a criminal statute, and its provisions and the proceedings under the statute do not relate to any criminal statute. It is not the same kind of statute as the nuisance statute in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the contempt statute in *Juidice v. Vail*, 430 U.S. 327 (1977), the public assistance payment statute in *Trainor v. Hernandez*, 431 U.S. 434 (1977), or the child custody and child abuse statute in *Moore v. Sims*, 442 U.S. 415 (1979).

Based on the above, it does not appear that the *Younger-Samuels* principle is applicable in the instant case. Notwithstanding, HHA submits that this Court should not hold Chapter 516 to be unconstitutional unless and until the State court has had an opportunity to consider the constitutional issue. Of course, if the statute is upheld as constitutional by this Court, there would be no need for such deferral to the State court.

Allowing the State court to decide initially the constitutional issue would be appropriate notwithstanding the *Younger-Samuels* doctrine as it appears today. In *Trainor v. Hernandez*, *supra*, one of the chief considerations that persuaded the court to invoke the abstention doctrine, other than the relatedness of the public assistance payment statute to criminal statutes, was that the state proceeding sought to vindicate "important state policies." Chapter 516 embodies State policies of the gravest sort. Further, in the instant case, the question of public use involves consideration of State constitutional provisions concerning the exercise of the power of eminent domain. "Proper exercise of federal jurisdiction requires controversies involving unsettled questions of State law be decided in the State tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions." *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640 (1959), *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970). See also *Wisconsin v. Constantinean*, 400 U.S. 433 (1971); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In addition, on the principles of comity and federalism, the taking under Chapter 516 should not be held to be lacking in public purpose without affording the State court a chance to rule on the

question. This is particularly so when the State courts are presumed to know, far better than the federal courts, the conditions giving rise to the statute. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *Clark v. Nash*, 198 U.S. 361 (1905); *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946).

B. *"Case or Controversy"*

At the time the Trustees filed their suit in the instant case, there was an actual controversy sufficient for the District Court to assert jurisdiction. As mentioned above, the Trustees' suit sought not only to enjoin the taking authorized by Chapter 516 and to receive a declaratory judgment that the taking is not for a public use, but also to enjoin the implementation and to secure a declaratory ruling that the statutory provisions on mandatory arbitration and on the method of calculating just compensation were not constitutional. The suit was filed at a time when HHA had ordered the Trustees into mandatory arbitration under Chapter 516 with respect to Block H of the tract of land owned by the Trustees in Waialae-Kahala, and HHA was in the process of ordering mandatory arbitration with respect to other lots owned by the Trustees. Preliminary Injunction Hearing, April 24-27, 1979 (RT at 219). Although the provisions on mandatory arbitration and method of calculating just compensation were declared invalid by the District Court (and HHA has not appealed from such holding), eminent domain action constituted the next step after mandatory arbitration under the procedure set forth in Chapter 516.

In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Supreme Court held that when prosecution is threatened, and the threat is real, there is an "actual controversy" for the court to take jurisdiction of a suit filed to enjoin such prosecution and to have the statute under which such prosecution is sought declared unconstitutional. In the instant case, under the circumstances outlined above, the threat of implementation of Chapter 516 in all respects as it existed at the time of the filing of the federal suit cannot be characterized as "imaginary" or

"speculative." Thus, there was an actual controversy permitting the District Court to assert jurisdiction over the case.

CONCLUSION

HHA respectfully submits that, although the *Younger-Samuels* doctrine of abstention, as it now stands, does not appear to require deference to State court proceedings in the instant case, this Court should not declare Chapter 516 to be unconstitutional without providing the State court an opportunity to rule on the issue. HHA further respectfully submits that an actual controversy existed at the time of the filing of the instant case in the District Court.

DATED: Honolulu, Hawaii, October 28, 1981

Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendant-Appellees,

—vs.—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenor-Appellees.

INTERVENOR-APPELLEES, WAI-KAHALA TRACT "H" ASSOCIATION, INC., HALAWA HILLS LANDSALE COMMITTEE, AWAKEA ASSOCIATION, ALII SHORES COMMUNITY ASSOCIATION, ENCHANTED HILLS, UNIT I, KALAMA VALLEY COMMUNITY ASSOCIATION, MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC., KAMILOIKI COMMUNITY ASSOCIATION, LUNALILO MARINA COMMUNITY ASSOCIATION, MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE SPINNAKER ISLE ASSOCIATION, WAIALAE IKI COMMUNITY ASSOCIATION, AND WAIAU COMMUNITY ASSOCIATION

SUPPLEMENTAL BRIEF FOR INTERVENOR-APPELLEES

[Filed Nov. 3, 1981]

I. *Introduction*

By this appeal the Trustees of the Bernice P. Bishop Estate (hereinafter "Trustees") seek to overturn a Final Judgment and Permanent Injunction issued by the District Court of Hawaii. The case involves the facial constitutionality of the Hawaii Land Reform Act, Hawaii Revised Statutes c. 516. The District Court ruled that some sections of the Act were unconstitutional, but severable. It enjoined enforcement of those sections. The constitutional challenge to those sections is now moot since they were amended out of the Act. The District Court ruled that, except for the excised sections, the Hawaii Land Reform Act is constitutional. Summary judgment was granted against the Trustees.

On appeal the Trustees ask this Court to reverse the District Court and declare the Hawaii Land Reform Act unconstitutional on its face. The Trustees further argue that the District Court was wrong in granting summary judgment, and that the case should be remanded for a full trial on constitutionality.

Intervenor-appellees, representing numerous lessee associations, believe the Trustees' attempt to have this Court strike down the state law must fail. As outlined in our Brief For Intervenor-Appellees, the standard for review is whether the state Legislature was so arbitrary, capricious and unreasonable that the Court must step in and overrule the legislative enactments. The Legislature believed that a social problem existed in Hawaii because of a severe land shortage. The means chosen to rectify this problem include the eminent domain statute under attack here, as well as interrelated statutes creating rent control and establishing lessees' rights. No fewer than three judges, two state and one federal, declared the Act constitutional. It is impossible for the Trustees to meet the standard and prove that the Legislature was completely without support of its actions.

The Trustees' position in this Court is extremely questionable for another, compelling reason. Under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), federal courts should

abstain from deciding a case of this magnitude in which the State is deeply involved while parallel actions are pending in state court.

When this complaint in this case was filed no action had been brought in state court either for a declaratory judgment or for condemnation under the Hawaii Land Reform Act. The records of the First Circuit Court, State of Hawaii, indicate that there are now at least fifteen cases pending. In almost all these pending cases the various landlords, including the Trustees, raised as affirmative defenses the alleged constitutionality of the Act. The state courts are squarely faced with deciding whether the Hawaii Land Reform Act is constitutional. While this pending appeal raises that question in a vacuum, merely looking at the statute on its face, the state courts will decide the constitutional challenge in the context of an actual application of the law.

Intervenor-appellee believes that the District Court decision was correct at the time issued. Considering the activity in state court since then, the interest of the State in this issue, and the need to preserve the relationship of comity between the federal and state systems, this Court should abstain. The case should be dismissed so that the state court may freely decide all issues involved with the state statute.

II. *History of Action Related to the Statute*

The Trustees filed their verified complaint in the U.S. District Court for the District of Hawaii, CR 1, on February 28, 1979. They sought a declaratory judgment that the Hawaii Land Reform Act is unconstitutional and injunctions preventing application of the Act. When the Complaint was filed, no action had been filed in state court to condemn any leased fee interest under the Act; no party sought to have a state court interpret the Act or declare it unconstitutional through an action for declaratory judgment. The Trustees had earlier filed a complaint for declaratory judgment and for instructions in state court on a companion statute, Act 185 of the 1975 Session Laws of Hawaii, codified as Haw.Rev.Stat. § 519-2. In

that prior case, *Midkiff v. Amemiya*, Civil No. 47103, Haw. First Cir. (1978), Judge Lum prepared extensive findings of fact and conclusions of law, including reaffirming the Legislative findings and purposes, and thus the constitutionality, of the Hawaii Land Reform Act. *Amemiya*, Finding No. 2.

In the instant case the District Court held that the mandatory arbitration and valuation formulae provisions of the Act were unconstitutional; however, this did not affect the Act as a whole becaused those sections were severable. Decision on Motion For Preliminary Injunction, CR 123, 471 F.Supp. 871. No appeal was taken on that ruling. The issue became moot when those infirmities were amended out of the Act. 1980 Haw.Sess.Laws, Act 107.

The District Court considered the Trustees' continued challenge to the Hawaii Land Reform Act with those constitutionally infirm sections excised. On December 19, 1979 Judge King issued his amended memorandum decision, CR 152, 483 F.Supp. 62, in which he declared the Act constitutional. The District Court granted summary judgment holding that it would be impossible for the Trustees to disprove every conceivable rationale supporting the Act. CR 152 at 11-12, 483 F.Supp. at 69-70.

Since the filing of the complaint in the instant case several condemnation proceedings were instituted in state court under the Act. The landlords whose interests are being condemned raise a number of defenses to the actions in their answers, including, apparently universally, the affirmative defense that the Act is unconstitutional. A typical example is the answer to complaint filed by the Trustees on March 20, 1980 in *Hawaii Housing Authority v. Midkiff*, Civil No. 60465, Haw. First Cir. The Answer alleges twenty-one separate defenses, including:

> *Third Defense*
>
> Chapter 516, HRS, is unconstitutional and illegal under the provisions of the United States Constitution.
>
> . . . .

Fifth Defense

Chapter 516, HRS, is illegal and Plaintiff [the Hawaii Housing Authority] is barred from pursuing the action herein under the provisions of the United States Civil Rights Act, 42 United States Code § 1983.

Sixth Defense

The attempted condemnation and taking of the property interests of Trustees herein is unconstitutional and illegal since it is not for a public use and purpose.

Seventh Defense

The regulations promulgated and issued by Plaintiff herein, including Amended Rule 10, under which Plaintiff has purported to act, are unconstitutional and illegal under the provisions of the United States Constitution.

. . . .

Ninth Defense

The regulations promulgated and issued by Plaintiff herein, including Amended Rule 10, under which Plaintiff has purported to act, are illegal under the provisions of the United States Civil Rights Act, 42 United States Code, § 1983.

. . . .

Thirteenth Defense

The complaint herein is barred as to any and all residential houselots wherein the leases for said lots were executed prior to the effective date of Chapter 516, HRS.

The state court was asked to rule on a motion for summary judgment as to these affirmative defenses. On October 20, 1981 Judge Fong issued his order granting defendant lessees' motions for partial summary judgment and denying defendant trustees' motion for summary judgment, *Hawaii Housing Authority v. Midkiff, supra*. The Court held the Hawaii Land Reform Act "is constitutional under the Constitution of the United States and does not violate the Fifth and Fourteenth Amendments of the United States Constitution or impair the

obligations of contract under the Constitution of the United States." A complete copy of this decision is attached to this brief as exhibit A, and a certified copy of the order was previously mailed to this Court.

There are now over fifteen actions in eminent domain under the Act pending in the First Circuit Court, State of Hawaii. The constitutional issues continue to be raised although the state courts are granting summary judgments against the landlords. Many of these cases end in settlement, but there is no question that the Hawaii Supreme Court will have to rule on the question of the Act's constitutionality, under both Constitutions: Hawaii's and the United States'.

III. *Argument*

The United States Supreme Court issued a number of decisions which limit the power of a federal court to take action that might interfere with an ongoing state proceeding. Beginning with *Younger v. Harris*, 401 U.S. 37 (1971), the Court has directed lower federal courts to respect proceedings in the state system and refrain from issuing injunctions against state courts and state officials. Although *Younger* involved a pending criminal case, the doctrine of abstention has been greatly expanded by the Court to include civil cases such as the case at bar. For a good summary of Supreme Court cases see *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981), fn. 1 & 2 at 1352-54.

The Ninth Circuit similarly expanded the reach of *Younger* abstention from criminal to state civil proceedings where the state has a particular interest. *Kinney v. Lenon*, 447 F.2d 596 (9th Cir. 1971). In *Kinney* the issue was a class action challenging a state statute denying bail to juveniles. The appellate court has ordered federal abstention in a number of non-criminal cases: *Phillips v. Osborne*, 444 F.2d 778 (9th Cir. 1971) (federal district court erred in enjoining state court litigation for breach of fiduciary duty); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973) (federal court should abstain and allow state court to decide issue of indigent father's right to court appointed counsel in child support case); *Williams v. State of Washing-*

ton, 554 F.2d 369 (9th Cir. 1977) (federal court should abstain from enjoining state proceedings because of state's interest in enforcing its Consumer Protection Act); *Worldwide Church of God, Inc. v. State of California*, 623 F.2d 613 (9th Cir. 1980) (federal court was correct in not enjoining state court from imposing a receivership on a church); *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981) (federal court should not enjoin state disciplinary proceedings against an attorney).

The Hawaii Land Reform Act is a vital part of an intricate structure fashioned over a twenty-five year period by the state legislative, judicial and executive branches. The State's interest in solving the social and economic problems created by the leasehold system and the shortage of land in the islands is illustrated by the extensive legislative findings of the remedial statutes. 1957 Haw.Sess.Laws, Act 13; 1975 Haw.Sess.Laws, Act 185; 1975 Haw.Sess.Laws, Act 184; 1975 Haw.Sess.Laws, Act 186. In the case at bar the State itself, through its agency, the Hawaii Housing Authority, is the named defendant in the suit brought by the Trustees to enjoin action taken pursuant to the Hawaii Land Reform Act. The Hawaii Housing Authority, and thus the State, is similarly required by statute to be the plaintiff in every eminent domain action brought under the Act. Haw.Rev.Stat. §§ 516-23 and 101-15. Clearly the State has "a particular interest" in the state civil proceedings. *Kinney v. Lenon, supra*.

The reasons for federal abstention are quite clear, whether called "comity" or "federalism." As the Ninth Circuit stated in *L.H. v. Jamieson, supra*, "Halting a pending state proceeding and amputating a federal defense constitutes an affront to the competency of state courts and seriously disrupts the coherency of state efforts to enforce its laws . . ." 643 F.2d at 1354.

The standards for abstention under *Younger* are also clear and were explained in *L.H. v. Jamieson, supra*,

> *Younger* and is progeny share two principal characteristics: (1) the plaintiffs sought to enjoin the continuation of a state proceeding or sought to enjoin state officials from

> enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement action during the normal course of the state proceeding. When these two characteristics are present, the argument for employing equitable restraint is compelling.
>
> 643 F.2d at 1352
> (footnotes omitted)

In the case at bar the Trustees explicitly sought to enjoin state officials from enforcing a state statute: they asked the District Court to "issue a permanent injunction against the defendants [the Hawaii Housing Authority], enjoining them from taking any action whatsoever under the purported authority of H.R.S. Chapter 516 with respect to the Trustees or the Trustees' leased residential lots." Complaint, CR 1, at 13.

There is no dispute that "the basis for federal relief", i.e. the challenge to the Act's constitutionality, could be raised as a defense in pending state proceedings. There are now state court proceedings in which the Trustees raised the Act's constitutionality as a defense. They were defeated in that regard not because the state courts refuse to hear the issue of federal constitutionality, but because the Act is clearly constitutional.

There are exceptions to *Younger* abstention, but they do not apply in this case. The federal courts should not abstain if there are extraordinary circumstances, defined as bad faith or blatent unconstitutionality. *Williams v. State of Washington, supra*. There is no allegation that any state action was brought in bad faith. The hearings by the Hawaii Housing Authority and the commencement of eminent domain proceedings were required by statute. Haw.Rev.Stat. §§ 516-22 and 516-23. Although the Hawaii Land Reform Act has been challenged for constitutionality, even the Trustees could not claim that it is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Watson v. Buck*, 313 U.S. 387, 402. Quoted in *Williams v. State of Washington, supra*, at 370.

Three judges independently decided that the Act is constitutional. If a federal court should intervene only when a state statute is clearly unconstitutional "in every clause, sentence and paragraph" then the opposite should also hold true: A federal court should abstain when a statute is clearly constitutional and has been declared so by competent state and federal judges.

The Fifth Circuit considered a similar situation only four months ago. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981), involved constitutional challenges to a Texas obscenity statutes. As in the case at bar the statute in question was declared to be constitutional by the District Court. Similarly, there were no state cases pending at the time the federal suits for declaratory judgment and injunctions were filed. The Appellate Court ruled that the District Court was correct in not applying *Younger* abstention at the time because of the lack of ongoing state court proceedings. However, a number of state court actions were started after the District Court's first decision, a change in the situation which "adds a factor of significant weight to the absention calculus . . ." 648 F.2d at 1033. The Court ruled that "intervening circumstances have rendered abstention by this Court appropriate," *id.*, not solely because of *Younger.* "Rather, our abstention is an exercise of the discretion we enjoy as an equity court confronting a suit seeking a suit seeking equitable relief from the challenged statute." *Id. Red Bluff Drive-In* is procedurally different from the instant case because *Red Bluff* also involved a question of *Pullman* abstention. (*Railroad Comm. of Texas v. Pullman*, 312 U.S. 496 (1941) instructs the federal courts to abstain until the state court can construe a state statute to define its terms and limitations. However, the terms and limitations of the Hawaii Land Reform Act are explicitly stated in the statute. *Eg.* Haw.Rev.Stat. §§ 516-1, 516-2, 516-21, 516-22.) Under the *Pullman* doctrine retention of jurisdiction by the federal courts is appropriate if there is a danger that the state courts will not resolve the federal constitutional questions. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d at 1025. Under the *Younger* doctrine or where the state courts can resolve all issues arising out of a

statute of primary importance to the people of that state the federal court should abstain and dismiss the federal complaint. The United States Supreme Court ordered such a dismissal in a case involving a constitutional challenge in federal court to another Hawaii statute.

> We are of the view, however, that the United States District Court for Hawaii, as a matter of its discretion, should have refused to grant this injunction. The complaint called for broad consideration of the application of the Act to foreign language schools and teachers. It had not been construed by the Hawaiian courts. . . . Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court . . . Entirely aside from the question of the propriety of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case.
>
> . . . .
>
> The judgment is reversed and the cause remanded to the District Court with directions to dismiss the complaint.
>
> *Stainback v. Mo Hock Ke Lok Po*,
> 336 U.S. 368, 383 (1949)
> (footnotes deleted)

In the case at bar the Hawaii Supreme Court is competent to decide all challenges raised by the Trustees to the Hawaii Land Reform Act. If the Trustees believe that there are still federal constitution questions remaining after the State Supreme Court has issued its decision they may appeal directly to the United States Supreme Court. No party will be prejudiced by this Court's abstaining to allow the state courts to first decide an issue of such great importance to the people of the state.

IV. *Conclusion*

Intervenor-appellees respectfully submit that this Court abstain and order this case remanded and the complaint dismissed.

DATED: Honolulu, Hawaii, October 28, 1981.

EXHIBIT A

[to Intervenors' Supplemental Brief]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 60465
(KSE)

HAWAII HOUSING AUTHORITY, a public body and a body corporate and politic,

Plaintiff,

—v.—

FRANK E. MIDKIFF, et al.,

Defendants.

ORDER GRANTING DEFENDANT LESSEES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT TRUSTEES' MOTION FOR SUMMARY JUDGMENT

The Defendant Lessees' Motions for Partial Summary Judgment and the Defendant Trustees' Motion for Summary Judgment having come on for hearing on Thursday, May 28, 1981, at 8:30 a.m., before the Honorable Arthur S. K. Fong, Judge of the above-entitled court, the Plaintiff Hawaii Housing Authority being represented by James J. Stone, Yukio Naito and Lester G. L. Wong, the Defendant Lessees being represented by A. Bernard Bays and Dan T. Kochi, the Lessee Sarah L. Thompson represented by Mark Uyeno, and the Defendant Trustees being represented by Albert I. Moon and Paul S. Aoki, and the Court having considered the memoranda and arguments of counsel herein, and

WHEREAS, the Court takes judicial notice of the decisions and findings in *Midkiff v. Amemiya,* Civil No. 47103, First Circuit Court of the State of Hawaii, and *Midkiff v. Tom,* Civil No. 79-0096, United States District Court for the District of Hawaii; and

WHEREAS, the Court further takes judicial notice of the concentration of land ownership by a few in the State of Hawaii and the significant amount of land held in residential leaseholds, facts which the Hawaii Supreme Court has judicially noticed in *Sawada v. Endo,* 57 Hawaii 608 (1977); and

WHEREAS, the Court finds as follows:

1. There are no disputes of material facts herein;

2. Chapter 516, Hawaii Revised Statutes, was properly enacted and the Legislature had a rational basis for it; and

3. Chapter 516 is for a public purpose—to distribute fee simple ownership of residential land to as many people as possible for the economic and social welfare of the public—

and the condemnation of the properties herein is for a public purpose pursuant to Chapter 516; and

WHEREAS, the Court further finds:

1. The taking under Chapter 516 is constitutional under the Constitution of the United States and does not violate the fifth and fourteenth amendments of the United States Constitution or impair the obligations of contract under the Constitution of the United States;

2. The taking under Chapter 516 is constitutional under the constitution of the State of Hawaii and does not violate the due process clause or the equal protection clause or impair the obligations of contract under the constitution of the State of Hawaii;

3. Chapter 516 does not violate the provisions of the United States Civil Rights Act, 42 U.S.C. Section 1983; and

4. Chapter 516 is applicable to residential leases executed prior to the enactment of the statute;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Defendant Lessees' Motion for Partial Summary Judgment and Supplemental Motion for Partial Summary Judgment regarding the issues mentioned above are hereby granted, and the remaining issues including issues 2, 4, 5, 6, and 7 of the Defendant Lessees' Supplemental Motion for Partial Summary Judgment are denied and reserved for trial herein; and

2. Defendant Trustees' Motion for Partial Summary Judgment is hereby denied.

DATED: Honolulu, Hawaii, Oct. 15, 1981

Intervenors' Supplemental Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Frank E. Midkiff, et al., v. Paul A. Tom, et al.

C.A. No. 80-4368

[Filed Oct. 30, 1981]

At oral argument heard by Judges Alarcon, Ferguson and Poole on October 21, 1981 in Honolulu, Hawaii with regard to the above-captioned case, all parties were directed to submit supplemental letter briefs on the subject of federal abstention from the case pending the conclusion of state proceedings. On behalf of Intervenor-Appellees Portlock Community Association, Kokohead Community Lease-Fee, Inc., West Marina Community Association and Hahaione Valley Community Association, Inc., we submit the argument below in favor of abstention.

One additional point should be brought to the Court's attention. At oral argument, Judge Poole directed some questions to me regarding the tax implications to the Appellants in this action flowing from the sale of their leased fee interests pursuant to the Land Reform Act. Although the Act of course cannot authoritatively resolve federal tax questions, the Hawaii Legislature has declared its intent in Section 516-27 of the Act that any conveyance of title to property by a fee owner to the Hawaii Housing Authority under Part II of the Act shall constitute a compulsory or involuntary conversion for state and federal tax purposes.

Our arguments in favor of absention by the Court are as follows:

1. THIS COURT SHOULD ABSTAIN FROM DETERMINING THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED BY THIS APPEAL

The rationale supporting Intervenor-Appellees' arguments in favor of abstention by this Court is twofold: First, a federal court considering the facial constitutionality of the Hawaii

Land Reform Act should have the benefit of findings of fact and conclusions of law by the State Supreme Court regarding relevant state and federal constitutional issues. A copy of Judge Lum's Findings of Fact and Conclusions of Law with respect to the Rent Renegotiation Act made in the case of *Midkiff v. Amemiya*, Civil No. 47103, (1st Cir. Ct. Haw. June 29, 1978) is attached hereto as Exhibit "A". Intervenor-Appellees submit that this Court should allow the state courts the opportunity to consider the constitutionality of the Land Reform Act and to make similar findings and conclusions prior to the submission of an action such as the present one to the federal courts. Secondly, since the issue of the constitutionality of the Land Reform Act "as applied" may be raised and litigated in the state condemnation proceedings, this Court should abstain from determining the facial constitutionality in the present action, thus allowing the simultaneous presentation of all constitutional issues to each court which is called upon to consider this important legislation.

A. The Land Reform Act is part of a comprehensive State constitutional and statutory scheme, the implementation of which should initially be left to the State.

Abstention is appropriate under circumstances such as those now before this Court for several reasons. The Hawaii Land Reform Act is part of a comprehensive constitutional and statutory scheme designed to deal with the shortage of fee simple land available within the State for residential purposes, and with the attendant social and economic consequences thereof to Hawaii's citizens. The preamble to the State Constitution begins with the words:

> We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."[1]

---

1 "The life of the land is preserved in righteousness."

We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

Several sections of the State Constitution refer to the quality of life to which Hawaii citizens are entitled.[2] There are no less than fourteen separate sections referring to housing, lands or real property, some of which are also concerned with social quality.[3] The framers alluded to the need, unique to the State of Hawaii, for state action to alleviate the problems associated with the shortage of useable land in the following sections of the constitution:

ARTICLE I

BILL OF RIGHTS

. . . Rights of Individuals

Section 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, *and the acquiring and possessing of property.* . . . (emphasis added)

ARTICLE IX

PUBLIC HEALTH AND WELFARE

. . . Housing, Slum Clearance, Development and Rehabilitation

---

2 The following sections of the Hawaii State Constitution make specific reference to the quality of life of Hawaii citizens:

Preamble;
Article I, Section 2;
Article IX;
Article XI.

3 Sections of the State Constitution referring to lands or real property are:

Article I, Sections 2 & 20;
Article XI, Sections 1-4 and 10;
Article XII, Section 1;
Article XVI, Sections 6-10 and 12.

Section 5. The State shall have the power to provide for, or assist in, housing . . . The exercise of such power is deemed to be for a public use and purpose.

ARTICLE XI

CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

Farm and Home Ownership

Section 10. The public lands shall be used for the development of land and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

To effectuate the constitutional mandate, the Hawaii Legislature enacted the Rent Renegotiation Act (Chapter 519 of the Hawaii Revised Statutes) and the Land Reform Act (Chapter 516 of the Hawaii Revised Statutes). The Rent Renegotiation Act provides certain limitations on the lessor's ability to renegotiate lease-rents where a residential houselot is subject to a long term lease. It affects the same interests in residential leaseholds which are addressed under the Land Reform Act. Both acts share the same legislative history, and both are supported by the same legislative findings. The history of these Acts is illustrated in the Record of this case, and a detailed discussion of same will not be undertaken in this brief. The Court is respectfully referred to the Record and the briefs of counsel filed herein.

If this Court were to strike down the Land Reform Act as violative of the Federal Constitution, the state constitutional and statutory scheme would be severely disrupted. State functions of great social and historical importance would be impaired, and a conflict between state and federal sovereignties would be created. Such a result is unnecessary and should be avoided in this litigation, particularly since there are condemnation proceedings brought by the Hawaii Housing Authority pursuant to the Land Reform Act presently pending in the state court.

It is a well settled principle of law that the presence of circumstances unique to a particular geographic area may support a finding of public use in the context of eminent domain proceedings where such a finding could not be made in another location where such unique conditions do not exist. *Clark v. Nash*, 198 U.S. 361 (1905); *Strickley v. Highland Boy G.M. Co.*, 200 U.S. 527 (1906).

A federal court would be considerably aided in making an informed determination as to whether the Land Reform Act authorizes the use of the power of eminent domain for a proper public use or purpose by the opportunity to refer to a state court determination of this issue under state law.

B. Abstention is appropriate where a state statute authorizing the use of eminent domain is made the subject of a federal constitutional challenge while state condemnation proceedings are pending.

Appellants have raised and will have the opportunity to litigate their constitutional claims in the state condemnation proceedings. Thus the presence of federal constitutional claims in the federal action does not preclude this Court's staying its hand. *Ahrensfeld v. Stephens*, 528 F. 2d 193 (7th Cir. 1975). In the *Ahrensfeld* case, an ordinance authorizing the use of the eminent domain power by an Illinois village was challenged in federal court on federal constitutional grounds. The federal court abstained from determining the constitutional issue, dismissing the action before it. In a well-reasoned opinion considering the occasion for absention by a federal court under circumstances closely resembling those now before this Court, the Seventh Circuit Court of Appeals affirmed the dismissal. Citing *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), the court noted the "sensitive nature" of federal court intervention in a state's eminent domain system, and further noted the *Thibodaux* court's remark that eminent domain is "intimately involved with state prerogative." The opinion also pointed out that several federal courts have held that state eminent domain proceedings should not be interfered

with by federal courts becuase their local nature makes interference unwise. Also cited with approval was *Creel v. City of Atlanta*, 399 F. 2d 777 (5th Cir. 1968), wherein that court stated in reference to a federal constitutional challenge proceeding simultaneously with a state court condemnation action:

> The principal and essential issue is one properly for determination by the state courts. Not only is municipal eminent domain ordinarily a local matter, but it is difficult to imagine a situation where more confusion would arise than would be the case if the parties here were allowed to simultaneously pursue both this action and the state condemnation proceeding. *Creel v. City of Atlanta*, supra at 779.

The *Ahrensfeld* court reasoned that, since the plaintiffs were able to raise the crux of their federal constitutional claims in the pending state action, federal court intervention was unnecessary. If the state supreme court should deny the plaintiffs any federal constitutional rights, they would then have the opportunity to bring the matter before the U.S. Supreme Court for reexamination and review. In light of these considerations, the court abstained. In doing so, it held that where a federal district court abstains in deference to pending state proceedings so as not to interfere with state sovereignty (i.e. in exercising *Burford*-type abstention), the proper disposition of the matter is dismissal. See also *Younger v. Harris*, 401 U.S. 37 (1971); *Crawford v. Courtney*, 451 F. 2d 489 (4th Cir. 1971); *Hamar Theatres, Inc. v. Cryan*, 393 F. Supp. 34 (D.N.J. 1975) (three-judge court); Wright, Law of Federal Courts, supra at 200.

C. Judicial policy disfavors a multiplicity of lawsuits arising out of the same set of facts.

It is well settled that strong judicial policy disfavors a multiplicity of lawsuits arising out of a single nucleus of operative facts. *Rosado v. Wyman*, 397 U.S. 397 (1970); *Southern Construction Co. v. U.S.*; 371 U.S. 57 (1962); *Moor v. Texas & N.O.R. Co.*, 75 F. 2d 386 (5th Cir. 19735);

Crompton-Richmond Co., Inc. v. U.S., 273 F. Supp. 219 (S.D.N.Y. 1967). Although Appellants have bifurcated their constitutional challenge to the Land Reform Act, alleging facial unconstitutionality under the Federal Constitution in the federal courts and raising state constitutional issues only in state court, in reality they seek to litigate the same issues simultaneously in two different forums. As the state condemnation actions proceed to judgment the Trustees can be expected to raise the issues on appeal to the Hawaii Supreme Court of facial constitutionality as well as constitutionality "as applied". Should the Trustees suffer an adverse ruling at the hands of that Court, they will be before the U.S. Supreme Court by right of appeal under 28 U.S.C. Section 1257(2). If this Court should now rule that absention is improper, the present litigation will also be before the U.S. Supreme Court, either by right of appeal by the Appellees pursuant to 28 U.S.C. Section 1254 (2), or by petition for certiorari by the Appellants pursuant to 28 U.S.C. Section 1254(1). Thus the federal constitutional issues will be brought before the U.S. Supreme Court in fragmented fashion on two separate appeals.

If, on the other hand, this Court chooses to abstain, dismissing the present action, all federal and state constitutional issues, whether of facial constitutionality or constitutionality "as applied", will be presented for determination in orderly procedural fashion, first in the state judicial system and then at the federal level. In this manner, the complete constitutional picture will be presented to each court which is called upon to rule on this important legislation, including any additional issues which might arise out of the implementation of the Act by the State.

D. Conclusion.

For the foregoing reasons, Intervenor-Appellees respectfully request that this Court enter an Order directing that this action be dismissed.

[DATED: October 28, 1981]

[Exhibits omitted in printing]

State Court Rulings in *Midkiff v. Amemiya*

IN THE
SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1978

No. 7294

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs-Appellants,

—vs.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants-Appellees.

JUDGMENT ON APPEAL

Pursuant to the Order Granting Motion for Partial Dismissal of Appeal filed by the Supreme Court of the State of Hawaii on April 14, 1982, and the Memorandum Opinion of the Supreme Court of Hawaii filed on May 5, 1982:

1. The appeal is dismissed as moot and the Judgment of the First Circuit is vacated as to paragraphs 1, 2 and 3 thereof, and the case is remanded with directions to dismiss the complaint as moot; and

2. Paragraph 4 of the Judgment of the First Circuit Court is affirmed as to the award of costs in the amount of $6,644.21 and reversed as to the award of attorneys' fees in the amount of $130,000.00.

DATED: Honolulu, Hawaii, MAY 18 1982.

IN THE
SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1978

No. 7294

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs-Appellants,

—VS.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants-Appellees.

NOTICE OF JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT COURT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following Judgment on Appeal:

Pursuant to the Order Granting Motion for Partial Dismissal of Appeal filed by the Supreme Court of the State of Hawaii on April 14, 1982, and the Memorandum Opinion of the Supreme Court of Hawaii filed on May 5, 1982:

1. The appeal is dismissed as moot and the Judgment of the First Circuit is vacated as to paragraphs 1, 2 and 3 thereof, and the case is remanded with directions to dismiss the complaint as moot; and

2. Paragraph 4 of the Judgment of the First Circuit Court is affirmed as to the award of costs in the amount of $6,644.21 and reversed as to the award of attorneys' fees in the amount of $130,000.00

DATED: Honolulu, Hawaii, MAY 18 1982.

IN THE
CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 47103

FRANK E. MIDKIFF, RICHARD LYAMN, JR., HUNG WO CHING, MATSUO TAKABUKI, and MYRON B. THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop,

Plaintiffs,

—vs.—

RONALD Y. AMEMIYA, Attorney General of the State of Hawaii, et al.,

Defendants.

ORDER DISMISSING PLAINTIFFS' COMPLAINT AS MOOT

Pursuant to the Judgment on Appeal filed by the Supreme Court of the State of Hawaii on May 18, 1982,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint for Declaratory Judgment and for Instructions, filed in the above-entitled action by Plaintiffs on December 29, 1975, and the First Amended Complaint for Declaratory Judgment and for Instructions, filed by Plaintiffs in the above-entitled action on February 27, 1976, be and hereby are dismissed as moot.

DATED: Honolulu, Hawaii, JUNE 2 1982.

Excerpt from reporter's transcript, April 24, 1979, pages 59-61

* * *

KAZUO KOHATSU was called as a witness by the plaintiff, was sworn, and testified as follows:

THE CLERK: Please state your name and address and spell your last name.

THE WITNESS: Kazuo Kohatsu, my last name is spelled K-O-H-A-T-S-U, Honolulu, Hawaii.

Direct Examination By Mr. Ashford:

Q What is you residence, Mr. Kohatsu?

A 1449 Aina Koa.

Q Mr. Kohatsu, what is your position at the Hawaii Housing Authority?

A I'm the Land Reform Administration with Hawaii Housing.

Q Have you held that position since December of 1969?

A Yes.

Q Do you have administrative supervision of all the HHA activity under Chapter 516, Hawaii Revised Statutes?

A Yes. I'm the administrator for the Land Reform Act.

Q Formerly you . . . . Strike that. To whom do you report?

A To the Executive Board.

Q That's Mr. Franklin Sunn?

A Yes.

Q Who is Mr. Sunn's predecessor in office?

A Mr. Yoshio Yanagawa.

Q And he was Executive Director?

A That's correct.

Q Commencing when?

THE COURT: If you remember.

A Quite a few years prior to my employment, sir.

Q And when did Mr. Sunn succeed Mr. Yanagawa, as near as you can remember?

A It has been a couple of years.

Q Wasn't it in fact somewhere around September or October of 1976?

A I think so.

Q Now, Mr. Kohatsu, I take it that you are thoroughly familiar with the mechanics and procedures under Chapter 516, are you not?

THE COURT: That's your job, right?

THE WITNESS: That's my job.

Q Would you describe briefly for the Court the sequence and the timing of the steps that must be taken under Chapter 516 for the holder of a single family residential lease to by his lessor's fee simple title with the assistance of the HHA?

MR. O'CONNOR: I object, your Honor. That was what we were not going to go into.

THE COURT: I thought it . . . . You mean it's not in the statute?

MR. ASHFORD: Your Honor, the purpose of the question is to show that the HHA is administering the statute exactly as it is written and there is no deviation from that. There are a couple of options which the HHA can take at certain steps in this procedure and to show which options they have elected.

THE COURT: Why don't you just zero in on the options instead of leaving it wide open like that, and we'll see if there is any objection to that.

MR. ASHFORD: Fine.

MR. O'CONNOR: I would object to his going into the options. I thought we were going to talk about the law on its face and whether or not the law is constitutional on its face and then we get into the operation of the HHA and the options available and then we get into the practical thing which will come, as I understand, in the next hearing.

* * *

Excerpt from reporter's transcript, April 26, 1979, pages 217-219

KAZUO KOHATSU resumed the witness stand.

* * *

Direct Examination (contd) By Mr. Ashford:

Q Mr. Kohatsu, the HHA Under statute Chapter 516 has initiated and brought to conclusion a number of condemnation actions, has it not?

A Yes, it has.

Q And in all of those condemnation actions to date, is it correct that agreement on the price was first reached by the lessors and lessees?

A That is correct.

Q And is it correct that the lessees themselves provided the funds to pay for the leased fee acquisitions?

A Yes, they did.

Q No public funds have been used to acquire any of those lots?

A That is correct.

Q No lots have been condemned and held by the HHA?

A That is correct.

Q All of the lots condemned have been immediately transferred to the lessees who provided the funds for acquisition?

A Yes.

Q And, in that process, the HHA has not taken any profit or other return on this transaction, has it?

A We are not allowed to do so by the Act, sir.

Q Now, in the 12 years that the statute has been in effect, has the HHA ever refused to hold a public hearing upon applications received?

A Not to my knowledge, sir.

Q Or to find that an acquisition would effect the public purposes of the statute?

A Not to my knowledge.

Q Or to direct negotiations between the lessors and the lessees when requested so to do by the lessees?

THE COURT: Say that again?

Q Has the HHA ever refused to direct lessors to enter into negotiations with the lessees when the lessees have asked the HHA to make that request?

A No; as long as the requirements have been fulfilled.

Q Has HHA ever refused when requested by the lessees to extend the time to complete negotiations that have been commenced?

A We have asked for the agreement between the lessor and lessees as to any extensions.

Q And that has been obtained, has it not?

A That is correct.

Q Has HHA ever refused to declare an impasse in negotiations when requested to declare an impasse by the lessees?

A The only case to date is the Waialae-Kahala H Tract where an impasse was considered at all.

Q And in that case to date the lessees requested an impasse be declared and it was declared, was it not?

A That is correct.

Q And in that case the lessees requested the HHA to order mandatory arbitration and it did so, did it not?

A Yes. the HHA did.

Q That has been the only procedure which, or the only application, group of applications, if you will, with respect to a development tract which has yet proceeded to that stage of ordering mandatory arbitration.

A That is correct.

Q There are others following along very closely behind, are there not?

A Yes.

* * *

State Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

NOTICE OF APPEAL
[Filed July 15, 1983]

The State of Hawaii and the Hawaii Housing Authority and Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher, Commissioners of the Hawaii Housing Authority, Franklin Y.K. Sunn, Executive Director of the Hawaii Housing Authority, Defendants-Appellees in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), hereby appeal from the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case dated March 28, 1983, under 28 U.S.C. § 1254 (2). Rehearing and rehearing *en banc* were denied in this case on June 17, 1983.

Dated: Honolulu, Hawaii, July 14, 1983.

Intervenors' Notice of Appeal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

U.S. District Court for the District of Hawaii

Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiff-Appellant,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, et al.,

Intervenors-Appellees.

Appeal from Final Judgment

Notice of Appeal to the Supreme Court
of the United States
[Filed July 15, 1983]

Notice is hereby given that Portlock Community Association (Maunalua Beach); Kokohead Community Lease-Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc., Intervenors-Appellees above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on March 28, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 14, 1983.

Intervenors' Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-4368

USDC Civil No. 79-0096

FRANK E. MIDKIFF, et al.,

Plaintiffs-Appellants,

—vs.—

PAUL A. TOM, et al.,

Defendants-Appellees,

—and—

WAI-KAHALA TRACT "H" ASSOCIATION, INC., et al.,

Intervenors-Appellees.

Notice of Appeal to the Supreme Court
of the United States
[Filed July 19, 1983]

Notice is hereby given that the Kahala Community Assn., Inc., et al., Intervenors-Appellees in this case, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Ninth Circuit entered March 28, 1983, rehearing denied by order dated June 17, 1983, reversing the Judgment of the United States District Court for the District of Hawaii entered June 10, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Honolulu, Hawaii, July 18, 1983.

Office - Supreme Court, U.S.
FILED
JAN 28 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-141, 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTARY JOINT APPENDIX

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Appeal No. 83-141 Docketed July 28, 1983;
Appeal No. 83-283 Docketed August 16, 1983.

Probable Jurisdiction Noted and Cases Consolidated October 31, 1983.

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Sample Land Lease Form

(Exhibit "B" to the Complaint filed in the United States District Court for the District of Hawaii on February 28, 1979)

FHA FORM NO. 2372H (Rev. 2/67)
VA FORM NO. 26-64506

LEASE

THIS INDENTURE, made this _____ day of _____, 19____, by and between

hereinafter called "Lessor," of the first part, and

whose residence and post-office address is

hereinafter called "Lessee," of the second part,

WITNESSETH: That Lessor, in consideration of the rent hereinafter reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed, does hereby demise and lease unto Lessee, and Lessee does hereby accept and rent:

SUBJECT to all easements shown on the map (if any) hereto attached or above referred to, and reserving unto Lessor within said easements rights-of-way and the right to grant to any public utility or governmental authority such rights-of-way over, across and under said easements for lines and other transmission facilities and appurtenances for electricity, gas, telephone, water, sewer, drainage and similar public services and utilities, and the right to enter for such purposes and to repair such facilities and to trim any trees in the way of such lines.

TO HAVE AND TO HOLD the same, together with the rights, easements, privileges and appurtenances thereunto belonging or appertaining, unto Lessee for the term of fifty-five (55)

years commencing on the _____ day of _____, 19____, subject to extension as herein provided, Lessee yielding and paying therefor unto Lessor in equal semiannual payments each in advance on the first day of _____ and _____ in each and every year during said term, provided that the first payment thereof shall be prorated to the next rental due date and paid upon the execution hereof, rent of $_____ per annum for and during the first _____ years of said term, and such annual rent for and during the remaining period of said term as shall be determined by mutual agreement of Lessor and Lessee or, if they fail to reach such agreement at least 90 days before the commencement of said period, by appraisal as hereinafter provided.

AND LESSOR hereby covenants with Lessee that upon payment of the rent as aforesaid and upon observance and performance of the covenants by Lessee hereinafter contained, Lessee shall peaceably hold and enjoy said premises for the term hereby demised without hindrance or interruption by Lessor or any other person or persons lawfully claiming by, through or under it except as herein expressly provided.

AND LESSEE hereby covenants with Lessor as follows:

1. PAYMENT OF RENT. Lessee will pay or cause to be paid said rent in lawful money of the United States of America at the times and in the manner aforesaid, without any deduction and without any notice or demand, at the office of Lessor or its duly designated agent.

2. PAYMENT OF TAXES AND ASSESSMENTS. Lessee will pay or cause to be paid at least ten days before the same become delinquent all real property taxes and assessments of every description to which said premises or any part thereof or any improvement thereon, or Lessor or Lessee in respect thereof, are now or may during said term be assessed or become liable, whether assessed to or payable by Lessor or Lessee, except that such taxes shall be prorated between Lessor and Lessee as of the dates of commencement and expiration respectively of said

term; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only such installments together with interest as shall become due and payable during said term.

3. PAYMENT OF RATES AND OTHER CHARGES. Lessee will pay before the same become delinquent all charges, duties, rates and other outgoings of every description to which said premises or any part thereof or any improvement thereon, or Lessor or Lessee in respect thereof, may during said term be assessed or become liable for electricity, gas, refuse collection, telephone, sewage disposal, water or any other utilities or services, whether made by governmental authority or public or community service company and whether assessed to or payable by Lessor or Lessee.

4. IMPROVEMENTS REQUIRED BY LAW. Lessee will at his own expense during the whole of said term make, build, maintain and repair all fences, sewers, drains, roads, curbs, sidewalks and parking areas which may be required by law to be made, built, maintained and repaired upon or adjoining or in connection with or for the use of said premises or any part thereof.

5. OBSERVANCE OF LAWS. Lessee will at all times during said term keep said premises in a strictly clean and sanitary condition and observe and perform all laws, ordinances, rules and regulations now or hereafter made by any governmental authority for the time being applicable to said premises or any improvement thereon or use thereof, and all recorded protective covenants and restrictions affecting said premises, and will indemnify Lessor against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance or nonperformance of said laws, ordinances, rules and regulations or of this covenant.

6. REPAIR AND MAINTENANCE. Lessee will at his own expense from time to time and at all times during said term well and substantially repair, maintain, amend and keep all

buildings and improvements now or hereafter built on the demised land with all necessary reparations and amendments whatsoever in good order and condition, except for damage by unavoidable casualty not herein required to be insured against, and maintain and keep said premises and all adjacent land between any street boundary of said premises and the established curb or street line in a neat and attractive condition.

7. INSPECTION. Lessee will permit Lessor and its agents at all reasonable times during said term to enter said premises and examine the state of repair and condition thereof, and will repair and make good all defects required by the provisions of this lease to be repaired by Lessee, of which notice shall be given by Lessor or its agents, within 30 days after the giving of such notice.

8. RESIDENTIAL USE. Lessee will use and allow the use of said premises only for residential purposes, and will not at any time during said term, erect, place, maintain or allow on said premises more than one single-family dwelling (exclusive of outbuildings), nor keep or allow to be kept on said premises any livestock, poultry or rabbits, nor use or allow the use of any building or structure on said premises as a tenement house, rooming house or apartment house or for or in connection with the carrying on of any business or trade whatsoever.

9. BOND. Lessee will before commencing construction of any improvement on said premises deposit with Lessor a bond or certificate thereof naming Lessor as an obligee, in a penal sum not less than one-half of the cost of such construction and with a responsible corporate surety authorized to do business in Hawaii, guaranteeing the completion of such construction free and clear of all mechanics' and materialmen's liens.

10. SETBACK LINES. Lessee will observe any setback lines affecting said premises as shown on the map (if any) hereto attached or herein mentioned in the description of said premises, and will not erect, place or maintain any building or structure whatsoever except approved fences or walls between any street boundary of said premises and the setback line along

such boundary nor maintain any hedge of a greater height than four feet above the ground level between such setback line and street boundary.

11. INSURANCE. Lessee will at his own expense at all times during said term keep all buildings now or hereafter erected on the demised land insured against loss or damage by fire with extended coverage in a responsible insurance company authorized to do business in Hawaii, in an amount as near as practicable to the replacement cost thereof, in the joint names of Lessor, Lessee and mortgagee (if any) as their interests may appear, payable in case of loss to the mortgagee (if any) or in the absence of any mortgage to Lessor and Lessee as their interests may appear, and will pay all premiums thereon when due and from time to time on request therefor deposit with Lessor a true copy or certificate of such current insurance policy, and any money derived therefrom in case of loss shall be held in trust in Hawaii and be immediately available to and used as soon as reasonably possible by Lessee for rebuilding, repairing or otherwise reinstating the same buildings in a good and substantial manner according to the plan and elevation of the buildings so destroyed or damaged or such modified plan as shall be previously approved in writing by Lessor; provided, however, that in case the main dwelling on said premises shall be destroyed by any casualty during the last ten years of the term hereof, Lessee may at his option cancel this lease by giving written notice thereof to Lessor within 30 days after such casualty on condition that before such cancellation becomes effective Lessee shall remove all remains of the damaged buildings and pay to Lessor a sum of money equal to the then present worth of the unearned annual rent for the remainder of said term calculated by compound interest discount at the interest rate the prevailing in Honolulu for residential real estate mortgage loans, and in case said dwelling shall be destroyed by any casualty at any time during said term, if such restoration thereof shall be prevented by law, Lessee may at his option cancel this lease by giving written notice thereof to Lessor at any time thereafter on condition that Lessee shall before such cancellation becomes effective remove all remains

of the damaged buildings and pay to Lessor all rent then accrued hereunder and taxes for the full current year, and upon either such cancellation all insurance proceeds shall be payable to and be the property of Lessee and mortgagee (if any) as their interests may appear; provided, further, that during such period as the Department of Housing and Urban Development or Veterans Administration shall own this lease all provisions of this lease requiring insurance and restoration of buildings which are substantially destroyed shall be inoperative, but such Administration shall promptly remove all remains of any damaged buildings not restored in accordance with said provisions.

12. LESSOR'S COSTS AND EXPENSES. Lessee will pay to Lessor on demand all costs and expenses including reasonable attorneys' fees incurred by Lessor in enforcing any of the covenants herein contained, in remedying any breach by Lessee of said covenants, in recovering possession of said premises, in collecting any delinquent rent, taxes or other charges hereunder payable by Lessee, or in connection with any litigation commenced by or against Lessee in which Lessee is found to be at fault and to which Lessor without any fault on its part shall be made party.

13. INDEMNITY. Lessee will indemnify and hold Lessor harmless against all claims and demands for loss or damage, including property damage, personal injury and wrongful death, arising out of or in connection with the use or occupancy of said premises by Lessee or any other person claiming by, through or under Lessee, or any accident or fire on said premises, or any nuisance made or suffered thereon, or any failure by Lessee to keep said premises in a safe condition, and will reimburse Lessor for all its costs and expenses including reasonable attorneys' fees incurred in connection with the defense of any such claims, and will hold all goods, materials, furniture, fixtures, equipment, machinery and other property whatsoever on said premises at the sole risk of Lessee and hold Lessor harmless for any loss or damage thereto by any cause whatsoever.

14. CONSTRUCTION OF IMPROVEMENTS. Lessee will not erect or place on said premises any building or structure including fences and walls, nor make any additions or structural alterations to any building thereon, except in accordance with plans and specifications including a detailed plot plan, which shall be prepared by a licensed architect if so required by Lessor, first submitted by Lessee and approved in writing by Lessor, and will landscape said premises suitably for the neighborhood, and will, unless the same is already built, at his own expense within the first _____ months of said term construct and complete on the demised land a single-family dwelling which (exclusive of garage and outbuildings) shall contain enclosed floor area at least _____ square feet.

15. WASTE AND UNLAWFUL USE. Lessee will not make or suffer any strip or waste or unlawful, improper or offensive use of said premises or use said premises for or in connection with the manufacture, sale, storage or keeping for sale or barter of any narcotics or alcoholic beverage or liquors.

16. LIENS. Lessee will indemnify and hold Lessor harmless against all liens, charges and encumbrances and all expenses in connection therewith including attorney's fees, with respect to said premises or any improvements thereon, which may result from any act or neglect of Lessee.

17. SURRENDER. At the end of said term, or other sooner determination of this lease Lessee will peaceably deliver up to Lessor possession of the demised land, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition except as aforesaid; provided, however, that if not then in default hereunder Lessee may within 30 days after such termination remove all buildings standing thereon.

AND IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows:

A. EXTENSION. From time to time during the first twenty years of the term hereby demised Lessee shall have the right to

extend said term to an extended term of fifty-five years commencing on the first day of the calendar month in which Lessee gives written notice thereof to Lessor, subject to the following conditions:

(i) The unexpired term of the lease at the time of exercising said option shall be less than fifty years;
(ii) The extension must be for the purpose of mortgaging the leasehold interest;
(iii) Lessee shall not then be in default in any respect hereunder; and
(iv) The notice shall be accompanied by payment of a service charge not to exceed $50.

In every case of extension the annual rent hereunder payable for and during the first 30 days of said extended term shall be determined as follows:

(a) Compute to the nearest whole year 75% of the unexpired period of fixed rent at the commencement of said extended term;
(b) Multiply the number of years computed in (a) by the fixed annual rent in effect immediately prior to such extension;
(c) Deduct from 30 years the number of years computed in (a) and multiply that difference by the annual rent determined by mutual agreement of Lessor and Lessee within 30 days after such extension or by appraisal as hereinafter provided, and
(d) Add the amounts computed in (b) and (c) and divide that sum by 30, and this result rounded to the nearest dollar shall be the annual rent for the first 30 years of said extended term, provided that such rent shall not without the consent of Lessor be less than the annual rent in effect immediately prior to such extension.

The annual rent hereunder payable for and during the remaining period of said extended term shall be determined by mutual agreement of Lessor and Lessee, or if they fail to reach such agreement at least 90 days before the commencement of said period, by appraisal as hereinafter provided.

B. APPRAISAL. Whenever this lease provides that the annual rent payable by Lessee for any period of the term hereof shall be determined by appraisal, such rent shall be the product of the then prevailing rate of return for similar lands (but not less than the then prime rate of interest in Hawaii) multiplied by the then market value of the demised land exclusive of improvements thereon, first deducting from such market value the then unamortized cost to Lessee of $_____ as the prorata share attributable to said premises for off-site subdivision improvements such as streets, sewers, water facilities and utilities in the tract of which said premises constitute part, amortized on a straight-line basis over 75 years from the date of commencement of this lease, and such return and market value shall be determined by three recognized real estate appraisers, one to be appointed by each of the parties hereto, and Lessor and Lessee shall each promptly name one such appraiser and give written notice thereof to the other party, and in case of failure of either party so to do within ten days after such notice by the other the party naming the first appraiser may apply to any person then sitting as judge of the Circuit Court of the First Circuit of the State of Hawaii for appointment of a second appraiser, and the two appraisers thus appointed in either manner shall appoint a third appraiser, and in case of their failure so to do within ten days after appointment of the second appraiser either party may have the third appraiser appointed by such judge, and the three appraisers so appointed shall proceed to determine the matters in question, and the decision of said appraisers or a majority of them shall be final, conclusive and binding on both parties hereto, and Lessor and Lessee shall each pay one-half of all proper costs and expenses of such appraisal other than attorneys' fees.

C. CONDEMNATION. In case at any time or times during the term hereof the demised premises or any part thereof shall be taken or condemned by any authority having the power of eminent domain, then and in every such case the estate and interest of Lessee in the demised land so taken or condemned shall at once cease and determine upon acquisition by such

authority of title thereto or right to possession thereof, and Lessee shall not by reason of such taking or condemnation be entitled to any claim against Lessor or others for compensation or indemnity for leasehold interest, and all compensation and damages for or on account of any land shall be payable to and be the sole property of Lessor, and all compensation and damages for or on account of any improvements on the demised land shall be payable to and be the sole property of Lessee; provided, however, that in case only part of said premises shall be so taken or condemned, the rent thereafter payable for the remainder of said term shall be reduced in an amount determined by mutual agreement of Lessor and Lessee not later than 30 days thereafter or otherwise in the proportion that the area so taken bears to the area hereby demised, and if the remaining premises shall thereby become unsuitable for residential purposes appropriate for the neighborhood, Lessee shall have the option to surrender this lease within 30 days thereafter and be relieved of further performance hereunder, provided, further, that in case all said premises shall be taken or condemned or Lessee shall exercise said option to surrender this lease, Lessor shall pay to Lessee from and to the extent of the net proceeds payable for the demised land the then unamortized cost to Lessee for off-site subdivision improvements computed as hereinbefore provided in paragraph B, provided, further, that whenever requested so to do Lessee shall peaceably deliver up to Lessor, without any reduction in rent or option to surrender this lease, possession of such portion or portions of the demised land lying within _____ feet of any street boundary thereof at the commencement of said term as may hereafter be required, taken or condemned for any street widening.

D. ASSIGNMENTS. Lessee may assign or mortgage this lease without approval or consent of Lessor, and the assignee shall have the same rights and obligations hereunder as the original Lessee; provided, however, that no such assignment shall be effective to transfer any interest in this lease unless Lessor shall have received either a true executed copy of such assignment or written notice thereof, and also, in any case

other than assignment by way of mortgage or assignment to or by the Department of Housing and Urban Development or Veterans Administration or upon foreclosure of mortgage or assignment in lieu of foreclosure, payment of a reasonable service charge not to exceed $25 and the written undertaking of the assignee to perform all obligations of Lessee hereunder, which undertaking may be incorporated in such assignment. No such assignment shall release the assignor from further liability hereunder unless Lessor shall consent in writing to such assignment, and Lessor will not require payment of any money except said service charge for such consent nor withhold such consent unreasonably or because of the assignee's national origin, race, color or creed; provided, however, that any person acquiring the leasehold estate in consideration of the extinguishment of a debt secured by mortgage of this lease or through foreclosure sale, judicial or otherwise, shall be liable to perform the obligations imposed on Lessee by this lease only during the period such person has possession of ownership of the leasehold estate.

E. DEFEASANCE. This demise is upon this condition, that if Lessee shall fail to pay rent or any part thereof within 30 days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall fail to observe or perform faithfully any of the other covenants or agreements herein contained and on the part of Lessee to be observed and performed and such default shall continue for 30 days after written notice thereof given to Lessee or mailed to his last known address, or if Lessee then owning this lease shall become bankrupt and fail to perform any of the covenants of Lessee hereunder or shall abandon said premises, Lessor may at once re-enter said premises or any part thereof in the name of the whole and, upon or without such entry, at its option terminate this lease, without service of notice or legal process and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract, and in case of such termination all buildings and improvements on the demised land shall become and remain the property of Lessor. If this lease is recorded in the Bureau of

Conveyances or filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii, such termination may but need not necessarily be made effective by recording or filing in such place an affidavit thereof by Lessor or a judgment thereof by a court of competent jurisdiction.

F. PROTECTION OF MORTGAGEE. During the existence of any mortgage of this lease Lessor will not terminate this lease because of any default by Lessee hereunder or other cause whatsoever, if, within a period of 120 days after Lessor has mailed written notice of intention to terminate this lease for such cause to the mortgagee at its last known address and also, if such mortgage is insured by the Department of Housing and Urban Development or guaranteed by the Veterans Administration, to such Department or Administration, the mortgagee or such Department or Administration shall either cure such default or other cause or, if the same cannot be cured by the payment of money, shall undertake in writing to perform all the covenants of this lease capable of performance by it until such time as this lease shall be sold upon foreclosure pursuant to such mortgage, and in case of such undertaking Lessor will not terminate this lease within such further time as may be required by the mortgagee or such Administration to complete foreclosure of such mortgage or other remedy thereunder provided (a) that such remedy is pursued promptly and completed with due diligence, and (b) that Lessor is paid all rent and other charges accruing hereunder as the same become due, and upon foreclosure sale of this lease the time for performance of any obligation of Lessee then in default hereunder other than payment of money shall be extended by the time reasonably necessary to complete such performance with due diligence. Ownership by or for the same person of both the fee and leasehold estates in said premises shall not effect the merger thereof without the prior written consent of any mortgagee to such merger.

G. MISCELLANEOUS. Acceptance of rent by Lessor or its agent shall not be deemed to be a waiver by it of any breach by Lessee of any covenant herein contained or of Lessor's right of

re-entry for breach of condition. Lessor's waiver of any breach by Lessee shall not operate to extinguish the term, covenant or condition the breach whereof has been waived nor be deemed a waiver of Lessor's right to declare a forfeiture for any other breach thereof. Any approval or consent by Lessor required by any provision hereof shall not be capriciously or unreasonably withheld. The term "premises" herein shall include (except where such meaning would be clearly repugnant to the context) all buildings and improvements now or at any time hereafter built on the land hereby demised. The terms "Lessor" and "Lessee" herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, the singular or plural number, and jointly and severally individuals, firms or corporations, and their and each of their respective successors, executors, administrators and assigns, according to the context hereof.

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first above written.

Sample Land Lease Form

(Exhibit "C" to the Complaint filed in the United States District Court for the District of Hawaii on February 28, 1979)

Lease No. 10,523

THIS INDENTURE, made this 8th day of August, 1956, by and between George M. Collins, Frank E. Midkiff, Edwin P. Murray, Willson C. Moore and Atherton Richards, all of Honolulu, City and County of Honolulu, Territory of Hawaii, Trustees under the Will and of the Estate of Bernice P. Bishop, deceased, hereinafter called the "Lessors," of the first part, and Matsuo Takabuki and Ayako Takabuki, husband and wife, of Honolulu aforesaid, as tenants by the entirety, hereinafter called the "Lessee," of the second part,

WITNESSETH: That the Lessors, in consideration of the rent hereinafter reserved, and of the covenants herein contained and on the part of the Lessee to be observed and performed, do hereby demise and lease unto the Lessee:

ALL that certain piece or parcel of land (part of Apana 2 of L. C. Aw. 228, R. P. 7721 to Kaleiheana) situate at Kahala, Honolulu aforesaid, containing an area of 10,836 square feet and comprising Lot 14, Block 10, Kahala Neighborhood Subdivision Tract "H", as shown on File Plan 559 filed in the Hawaiian Registry of Conveyances, a copy of which is filed in the office of the Lessors as Bishop Estate Map 5320.

[CANCELLED]

TO HAVE AND TO HOLD the demised premises unto the Lessee from the first day of AUGUST, 1956, for the term of FIFTY-FIVE (55) YEARS thence next ensuing, the Lessee YIELDING AND PAYING therefor unto the Lessors for and during the first twenty-five (25) years of said term the annual rent of FOUR HUNDRED FORTY DOLLARS ($440.00), and for and during the remaining thirty (30) years of said term such annual rent as shall be mutually agreed upon by the Lessors and the Lessee, or in the event of failure to reach an agreement

such annual rent as shall be determined by arbitration as hereinafter provided, all said annual rents to be payable in equal semiannual payments each in advance of the first day of February and the first day of August in each and every year during the continuance of this lease, without any deduction, the first payment of $220.00 to be made on the execution of these presents.

AND THE LESSORS hereby covenant with the Lessee that, upon payment by the Lessee of the rent as aforesaid and upon observance and performance of the covenants by the Lessee hereinafter contained, the Lessee shall peaceably hold and enjoy the demised premises for the term hereby demised without hindrance or interruption by the Lessors or any other person or persons lawfully or equitably claiming by, through or under them; and, further, that the Lessee shall have the right at the end of said term to remove from the land hereby demised all buildings thereon, but such right will not exist in case the term granted by this lease shall be forfeited by reason of a breach of condition on the part of the Lessee.

AND THE LESSEE hereby covenants with the Lessors as follows:

1. PAYMENT OF RENT. That he (the Lessee) will pay the said rent in lawful currency of the United States of America at the office of the Lessors in Honolulu, in manner aforesaid, without any deduction and without any notice or demand;

2. PAYMENT OF TAXES, ASSESSMENTS, ETC. That he will also pay, when and as the same become due and payable, all taxes, rates, assessments, charges and other outgoings of every description to which the demised premises, or the Lessors or Lessee in respect thereof, are now or may during said term be assessed or become liable; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, the Lessee shall be required to pay only such installments as shall become due and payable during the term of this lease together with a like

number of installments of interest each in an amount computed by determining the total interest payable during the term hereof with respect to such assessment and dividing said total interest payable by the number of installments of principal to the paid on said assessment by the Lessee hereunder; provided, further, all assessments against said premises under Improvement Districts 88 and 90 shall be paid by the Lessors;

3. BUILD AND MAINTAIN FENCES, SEWERS, DRAINS, ETC. That he will, at his own expense, during the whole of the said term, make, build, maintain and repair all fences, sewers, drains, roads and sidewalks, which may be required by law to be made, built, maintained and repaired upon or adjoining or in connection with or for the use of the said premises or any part thereof;

4. REPAIR BUILDINGS; SANITARY REGULATIONS. That he will, at his own expense, from time to time and at all times during said term, keep all buildings and improvements now or hereafter built on the land hereby demised in good order, condition and repair, reasonable wear and use thereof and damage resulting from acts of God other than fire alone excepted; and also, during said term, will keep the said premises in a strictly clean and sanitary condition, and observe and perform all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable to the said premises; and will indemnify and save harmless the Lessors and the estate and effects of the said Bernice P. Bishop against all actions, suits, claims and damages by whomsoever brought or made by reason of the failure to keep said buildings and improvements in good order, condition and repair, or by reason of the nonobservance or nonperformance of the said laws, ordinances, rules and regulations, or of this covenant;

5. INSPECTION OF PREMISES. That he will permit the Lessors and their agents, at all seasonable times during the said term, to enter the said premises and examine the state of repair and condition thereof and will repair and make good all defects required by the terms of this lease to be repaired and made good by him of which notice shall be given by the

Lessors, or their agents, within thirty days after the giving of such notice;

6. LESSEE TO ERECT DWELLING. That he will, at his own expense, within and during the first year of said term, erect and complete a single-family dwelling on the land hereby demised, which dwelling shall not exceed two (2) stories in height and shall contain a ground floor area of not less than Fifteen Hundred (1500) Square Feet, not including servants' quarters and garage, and shall cost, exclusive of outbuildings, not less than Fifteen Thousand Dollars ($15,000.00), the plans, specifications and plot plan showing the location of such dwelling to be first approved by the Lessors in writing and that the Lessors shall be the sole judges of the cost of said dwelling and as to what constitutes a dwelling and an outbuilding;

7. SINGLE-FAMILY DWELLING. That he will use or allow to be used the premises hereby demised solely for residential purposes and will not at any time during said term erect, place or maintain, or permit or suffer to be erected, placed or maintained, upon said premises more than one single-family dwelling (exclusive of outbuildings), which dwelling shall have been erected at a cost and in conformity with all of the requirements as set out in the covenant immediately preceding;

8. FIRE INSURANCE. That he will, at his own expense, at all times during the said term, keep insured all buildings now or hereafter erected on the land hereby demised against loss or damage by fire with extended coverage in the joint names of the Lessors, the Lessee and the Mortgagee, if any, as their respective interests may appear, in some insurance company approved by the Lessors in a sum not less than eighty per cent (80%) of the value of said buildings, and will for that purpose pay all premiums and sums of money payable in respect of such insurance, and will from time to time forthwith after receiving the same deposit with the Lessors the policy or policies of insurance or satisfactory evidence thereof and the receipt for every premium and sum of money so paid or satisfactory evidence thereof; and in case the said buildings be destroyed or damaged by fire or other such casualty, then and

as often as the same shall happen, all moneys received in respect of such insurance shall with all convenient speed be laid out by the Lessee in rebuilding, repairing or otherwise reinstating the buildings in a good and substantial manner according to the plan and elevation of the buildings so destroyed or damaged by fire or other such casualty, or according to such modified plan as shall be previously approved by the Lessors in writing; Provided, However, that in case the main dwelling on the demised premises shall, within the last five (5) years of said term, be destroyed by fire or other such casualty, or shall be so damaged by fire or other such casualty as to render it unfit for occupation or use, the Lessee shall have the option (a) to restore and rebuild the building as aforesaid or (b) to surrender this lease, which option to surrender shall be conditioned on the Lessee's removing as soon as practicable the building damaged by fire or other such casualty and the debris resulting from such fire or other such casualty and all other buildings (if any) which may be then on the land hereby demised and paying in advance to the Lessors the rent herein reserved accruing to the date of surrender, taxes for the whole year in which such damage or destruction by fire or other such casualty shall occur, and the cost of such surrender, it being understood that upon the surrender of this lease as aforesaid the Lessors shall assign their interrest in said policy or policies and the proceeds thereof to the Lessee;

9. MAINTENANCE OF PREMISES. That he will maintain the demised premises in a neat and attractive condition and in such manner as shall be approved by the Lessors or their agents and will keep planted with grass in a growing condition and free from weeds all land lying between the street property line or lines of the demised premises and the established curb line or lines;

10. MECHANICS' LIENS. That he will keep and maintain the demised premises free and clear of all mechanics' and materialmen's liens and in the event any lien is filed against the said premises or any improvements thereon, will indemnify and save harmless the Lessors from all loss, cost and expense

with respect thereto and will, prior to the construction of any improvements on the said premises, deposit with the Lessors a certificate or other evidence satisfactory to the Lessors that the contractor has obtained a bond with a surety approved by the Lessors, guaranteeing the construction of the improvements free and clear of all mechanics' and materialmen's liens, and he further agrees that, whenever the Lessors shall require, he will furnish a bond or other security approved by the Lessors guaranteeing the completion of any such improvements free and clear of all mechanics' and materialmen's liens;

11. BUILDING LINE. That he will not erect or maintain any building or structure or any fence or hedge of a greater height than four feet above the ground level outside of the building line or lines indicated on the sketch hereto attached and made part hereof;

12. TENEMENTS, ETC. That he will not permit or suffer any building or structure to be erected or placed on the land hereby demised for use as a tenement house, rooming house, or apartment house, nor use any building or structure on the land hereby demised as a tenement house, rooming house or apartment house, or for or in connection with the carrying on of any business or trade whatsoever;

13. WASTE, ETC. That he will not make or suffer any strip or waste or unlawful, improper or offensive use of the said premises, nor, without the consent in writing of the Lessors, make or suffer any addition to or alteration of any buildings now or at any time hereafter built on the land hereby demised;

14. ASSIGNMENT AND SUBLETTING. That he will not, without the consent in writing of the Lessors, assign this lease, nor sublet the said premises as a whole, or in part, excepting only that the Lessee without such consent *but upon giving notice to the Lessors as hereinafter provided may* assign this lease by way of mortgage to a recognized lending institution, and the Mortgagee, or the Federal Housing Administration, if it shall become the assignee, may cause this lease and any such mortgage, or any of them, to be filed for record in the Hawaiian Registry of Conveyances, or in the Office of the

Assistant Registrar of the Land Court of the Territory of Hawaii, and enforce any such mortgage and acquire title to the leasehold and any removable improvements in any lawful way, and rent the property pending foreclosure and acquisition and disposal of title; and the Mortgagee, or the Federal Housing Administration, if it shall become the assignee, may sell and assign this leashold and the improvements thereon, or may sublet the demised premises in whole, but no other or further assignment shall be made without the written consent of the Lessors. Any person acquiring the leashold estate in consideration of the extinguishment of the debt or through foreclosure sale, judicial or otherwise, or any party claiming by, through or under any such person, shall be liable to perform the obligations imposed upon the Lessee by this lease only during the period such person or party has possession or ownership of the leasehold estate. In the event this lease is assigned by way of mortgage as aforesaid, the Lessors further agree that they will not terminate this lease because of the failure on the part of the Lessee to observe or perform any of the covenants contained in this lease, or because of the bankruptcy or insolvency of the Lessee or because the Lessee shall abandon the said premises or suffer this lease or any estate or interest hereunder to be taken under any writ of execution or make an assignemnt for the benefit of creditors, if the Mortgagee, within sixty (60) days after receipt of written notice from the Lessors of intention to terminate this lease for any of such causes, shall either cure such default, if the default can be cured by the payment of money, or, if such is not the case, shall undertake in writing to perform all covenants of this lease capable of performance by the Mortgagee until such time as this lease shall be sold upon foreclosure pursuant to any such mortgage, or if assigned to the Federal Housing Administration, until this lease shall have been sold by said Administration. The Lessee shall notify the Lessors in writing in each case where such assignment is made by way of mortgage, giving the name and address of the Mortgagee, the date of the mortgage and the liber and page number of recordation or the Land Court document number thereof, such notification to be made within ten days after the completion of the recordation or registration of the mortgage;

15. LIVESTOCK, POULTRY AND LIQUOR. That he will not permit or suffer to be kept on the demised premises any livestock or poultry, nor permit or suffer the said premises to be used for or in connection with the manufacture or sale of ale, wine, beer, spirits or other alcoholic liquors;

16. ATTORNEY'S FEE AND EXPENSES. That in the event that the Lessors shall bring and sustain an action against the Lessee for breach of any covenant or condition herein contained or for the recovery of possession of the demised premises, the Lessee will pay to the Lessors all costs and expenses incurred by them in such action, including a reasonable attorney's fee;

17. SURRENDER. That at the end of the said term the Lessee will peaceably deliver up to the Lessors possession of the land hereby demised, together with all improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition, except buildings as aforesaid;

For additional Covenant 18 see rider attached hereto and made a part hereof.

IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows:

(a) That in the event the Lessors and the Lessee shall fail to reach an agreement before the end of the twenty-fifth year of said term in the matter of the annual rental payable hereunder for and during the last thirty years of said term, then and in such case the annual rental shall be the fair and reasonable annual rental of the land hereby demised (exclusive of buildings) as shall be determined by three arbitrators, who shall be recognized real estate appraisers, one to be appointed by each of the parties hereto, and either party may give to the other written notice of a desire to have an arbitration of the matter and name therein one of the arbitrators, whereupon the other party shall within ten (10) days after the receipt of such notice, name another arbitrator and give notice thereof to the party seeking arbitration, and, in case of failure so to do, the party

who has named an arbitrator shall have the right to apply to the person then sitting as the senior judge in service of the Circuit Court of the First Judicial Circuit, requesting him to appoint an arbitrator to represent the party so failing to appoint an arbitrator, and the two arbitrators thus appointed (in either manner) shall select and appoint a third arbitrator and give notice thereof to the Lessors and Lessee, and in the event that the two arbitrators so appointed shall, within ten (10) days after the naming of the second arbitrator, fail to appoint the third arbitrator, either party shall have the right to apply to such judge to appoint such third arbitrator, and the three arbitrators so appointed shall thereupon proceed to determine the matter in question, and the decision of any two of them shall be final, conclusive and binding upon both parties and judgment may be entered upon such award by the Circuit Court of the First Circuit unless the same shall be vacated, modified or corrected as provided in Chapter 165, Revised Laws of Hawaii 1945, or as the same may be amended or re-enacted from time to time, the provisions of which said statute shall apply hereto as fully as though incorporated herein; provided, however, that in the event two of the above three arbitrators shall fail to reach an agreement in the determination of the matter in question, the matter in question shall be decided by three new arbitrators, who shall likewise be recognized real estate appraisers, and who shall be appointed in the same manner aforesaid, and this process shall be repeated until a decision is finally reached by two of the arbitrators; and provided, further, that the parties hereto shall each pay for the services of its own appointee and one half of all other legitimate costs of said arbitration, other than attorneys' fees and witness fees;

(b) That in case at any time during said term the demised premises or any part thereof shall be taken or condemned for any public use by any authority having the power of eminent domain, then and in every such case the estate and interest of the Lessee in the property taken shall at once cease and determine, and all compensation payable or to be paid by reason of the taking of any land and improvements (other than

buildings) shall be payable to and be the sole property of the Lessors; and that such compensation as shall represent the value of any buildings erected upon the land shall be paid to the Lessee who thereupon (unless all of the demised premises shall have been so taken, or the Lessee shall exercise the option to surrender this lease as hereinafter provided) shall forthwith lay out and expend the money so received by him in rebuilding or repairing such buildings or in substituting therefor other buildings upon the remainder of the demised premises, the new dwelling when re-built or substituted shall cost and be fairly worth at least Fifteen Thousand Dollars ($15,000.00) and shall conform in every respect to all the requirements pertaining to the erection of a single-family dwelling as set out in preceding Covenant No. 6 of the Lessee, and in case the compensation received by the Lessee as aforesaid shall be insufficient for the purpose the Lessee shall make up the deficiency out of his own moneys; provided, however, that in case a part of said premises shall be taken or condemned, the rent thereafter payable for the remainder of the term shall be reduced (calculated to the nearest dollar) in the proportion that the area of land so taken shall bear to the area hereby demised, and the Lessors shall refund to the Lessee the unearned portion (if any) of the semiannual installment of the rent which shall have been paid in advance, and in the event that such partial taking or condemnation shall render the remainder of the demised premises unsuitable for residential purposes, the Lessee shall have the option to surrender this lease and be relieved of further performance hereunder, and in case the parties cannot agree that the remainder of the premises is unsuitable for residential purposes, then the matter shall be settled by arbitration in the same manner as provided above for the determination of rent for the latter portion of said term.

PROVIDED, HOWEVER, and this demise is upon this condition, that if the Lessee shall fail to pay the said rent or any part thereof within thirty days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall become bankrupt, or shall fail faithfully to observe or perform

any of the covenants herein contained and on the part of the Lessee to be observed and performed, or shall abandon the said premises, the Lessors may at once without legal process re-enter the said premises or any part thereof in the name of the whole and, upon or without such entry, at their option terminate this lease or bring suit for summary possession against the Lessee without prior notice or demand and without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract, if, after written notice of any such default or breach of contract shall have been given by the Lessors to the Lessee, the Lessee shall have failed within thirty days after the receipt of such written notice to remedy such default or breach of contract;

AND IT IS HEREBY expressly agreed and declared that the acceptance of rent by the Lessors shall not be deemed to be a waiver by them of any breach by the Lessee of any covenant herein contained, nor of the Lessors' right of re-entry for breach of covenant; that the term "premises" wherever it appears herein includes and shall be deemed or taken to include (except where such meaning would be clearly repugnant to the context) all buildings and improvements now or at any time hereafter built on the land hereby demised, and that the term "Lessors" in these presents shall include the Lessors, their successors in trust and assigns, and also that the term "Lessee," or any pronoun used in place thereof, shall indicate and include the masculine or feminine, the singular or plural number, individuals, firms or corporations, and their and each of their respective successors, executors, administrators and permitted assigns, according to the context hereof.

IN WITNESS WHEREOF the parties hereto have executed this instrument in duplicate the day and year first before written.

[signatures omitted]

RIDER mentioned in and made part of Bishop Estate Lease No. 10,523 to MATSUO TAKABUKI and AYAKO TAKABUKI,

husband and wife, dated August 8, 1956, being an additional covenant numbered 18 of the Lessee therein:

18. *Underground Electric Utilities.* That he will reimburse the Lessors for the additional cost incurred by them in the installation of the electric utilities underground instead of overhead in the subdivision of which the demised land forms a part, such cost allocated to the demised land being the agreed sum of $480.00 which shall be paid by the Lessee to the Lessors in annual installments of $36.68 each in advance over a period of twenty (20) years beginning with the commencement date of this lease, on the first day of August in each and every year during the said twenty-year period, the first of such installments to be paid on the execution of these presents. The payment of such annual installments over said period of twenty years will amortize the said principal sum of $480.00 with interest computed at five per cent (5%) per annum.

Nos. 83-141 and 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Appellees respectfully submit that the only questions properly before this Court are the following:*

1. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of that title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots of which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation; (c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the State only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained title.

2. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine, (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that

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* The various appellants in Nos. 83-141, 83-236 and 83-283 cannot agree as to what the Questions Presented are and have set forth three different sets of such questions. *See* the Jurisdictional Statement of the Hawaii Housing Authority *et al.* (hereinafter "HHA JS"), at i; the Jurisdictional Statement of the Kahala Community Association *et al.* (hereinafter "Kahala JS"), at 1; and the Jurisdictional Statement of the Portlock Community Association *et al.* (hereinafter "Portlock JS"), at i.

any exercise of the state's eminent domain authority "is for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation;

(b) under the *Younger* doctrine, (i) the State never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law;

(c) under the *Burford* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) appellees raised substantial federal constitutional claims under 42 U.S.C. § 1983 in their complaint; (iii) there was no question of whether the State had the purported authority, under state law, to condemn appellees' property; and (iv) the State had not established a specialized court system to resolve state condemnation suits; and

(d) under the *Colorado River* doctrine, (i) no party had ever contended before now that abstention was appropriate under this doctrine; (ii) there was no federal statute counseling in favor of state court litigation; (iii) plaintiffs' claims were based upon federal law; (iv) the federal suit preceded the filing of any state court suit; (v) abstention would inevitably have led to piecemeal litigation; and (vi) there was no inconvenience to the parties in litigating this case in federal court.**

** If probable jurisdiction is noted, appellees will also address the following questions which were presented to, but did not have to be decided by, the Court of Appeals:

3. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by impermissibly

delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 1 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 1 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

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Fourteenth Amendment	14
Statutes:	
Haw. Rev. Stat. ch. 171	8
Haw. Rev. Stat. ch. 516	*passim*
Haw. Rev. Stat. ch. 519	4
1968 Haw. Sess. Laws Act 46	10
1971 Haw. Sess. Laws Act 215	8
1975 Haw. Sess. Laws Act 186, § 1	9
Treatises:	
Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351	16, 17
2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* (rev. 3d. 1981 & Supp. 1982)	17, 18, 22
Stoebuck, *A General Theory of Eminent Domain*, 47 Was. L. Rev. 553 (1972)	17, 18
Other:	
Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800	5, 18
Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859	5, 18
Construction in Hawaii	3
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-141

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-283

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

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MOTIONS TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Frank E. Midkiff, *et al.* (hereinafter "Trustees"), move that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed on the ground that the judgment is plainly correct and the challenge to it so insubstantial as to warrant no further review.

STATEMENT[1]

A. Trustees and the Affected Leaseholds

Trustees administer the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first monarch of Hawaii. The nucleus of her Will was a perpetual charitable trust[2] for the establishment and support of the Kamehameha Schools. The Schools provide a wide array of educational services for children of Hawaiian ancestry in kindergarten through high school, in addition to scholarships and other grants for post-high school education. The Schools also reach a broad segment of the Hawaiian community through their Extension Education Division and programs for public school students.

After her death in 1884, the Princess' estate consisted of lands (mostly inherited from other members of the Royal Family) which now comprise about 9% of the land area in Hawaii. Much of this land is inaccessible or otherwise unusable, *e.g.*, in lava fields and watershed areas. These lands, together with those zoned and used for agriculture, comprise nearly 98% of Trustees' land holdings. Less than 3% of the trust lands are devoted to residential, resort and commercial use, and the income generated from these lands provides nearly the sole support for the Schools.

Leasing of residential lots in Hawaii did occur prior to World War II, but there were relatively few leaseholds as compared to lots owned in fee simple by households. The number of leasehold lots substantially increased after

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[1] Trustees have filed a separate Motion to Affirm in *Portlock Community Association* v. *Midkiff*, No. 83-236, and incorporate by reference the Statement and following discussion contained therein. These Motions are addressed to appellants' Public Use requirement arguments. We respond to appellants' abstention arguments in our Motion to Affirm in No. 83-236.

[2] Pursuant to direction of the Will, successor trustees are appointed by the Justices of the Supreme Court of Hawaii.

World War II as a result of heavy demand for single family residences and the need to meet that demand with minimum capital expenditure by the families requiring new housing. The practice of leasing, rather than selling, residential lots in newly-developed subdivisions arose mainly from (a) the inability of most of the market (primarily veterans and other young people) to pay for *both* the fee simple title to the lot *and* the residence upon the lot, (b) the fact that most new lots were developed on land owned by relatively large landholders [3] who had held the land for decades, had an extremely low "basis," and would have had to pay ordinary income tax on nearly 100% of fee simple sale proceeds as "dealers," [4] and (c) restrictions inhibiting sales in the trust instruments of some of these large landholders. The developers of many small subdivisions, who were not inhibited by tax reasons or trust restrictions, also leased rather than sold residential sites because of the limited financial capabilities of prospective occupants. Notwithstanding these leaseholds, fee simple ownership was always, and is, the prevalent method of residential landholding in Hawaii.[5]

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[3] Most, but by no means all. Many subdivisions of fewer than 100 lots were developed and leased by owners of small tracts. These subdivisions, too, are impacted by the statute.

[4] Trustees, who are in this group, also had to be concerned with protecting the status of the trust as a tax exempt organization.

[5] On the Island of Oahu, as of January 1, 1982, there were 72,839 owner-occupied units (single *and* multi-family) where the land was owned in fee simple, as compared with 35,539 leasehold units. *The State of Hawaii Data Book*, table 486 (1982). Cumulative statistics covering single-family units alone have not been published. Figures are available for recent sales and show that fee simple sales have heavily predominated over leasehold sales of newly developed units. In 1981, for example, on Oahu, 69% of newly-built single-family units were on land sold with the residence in fee, and 31% were on land leased to the purchaser of the residence. *Construction in Hawaii* (Bank of Hawaii, 1982). Virtually all of the residential leaseholds affected by Chapter 516 are located on the Island of Oahu.

Since the 1950's, most of Trustees' leases have been on FHA and VA approved forms to permit lessees to finance purchase of their homes through mortgages with FHA or VA guarantees. A typical lease has a term of 55 years, with annual rental fixed for the first 30 or 40 years at a constant amount. Upon expiration of the initial fixed rental period, lessor and lessee renegotiate a new rent based upon a percentage of a statutority limited portion of the market value of the land, exclusive of the value of structures on the land. Almost all leases provide for arbitration of conflicting views, and the amount of rent that can be charged on the reopening of the stipulated rental is restricted by legislation.[6] Lessees may freely assign and mortgage their leases.[7] The majority of Trustees' residential leases in effect at the onset of this litigation were executed prior to the enactment of Chapter 516.

B. The Statute

It should be noted at the outset that the bulk of the findings relied upon by appellants were not even part of the original statute.[8] They were not adopted until 1975,

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[6] Fixed at 4% of a legislatively defined "owner's basis" which drastically reduces the value of Trustees' interest in the lots. Haw. Rev. Stat. § 519-2.

[7] All of these provisions of the leases are further amplified and assured by the "Lessees' Bill of Rights," not in issue in this litigation. Part III of Chapter 516, Haw. Rev. Stat. §§ 516-61 through 70 (HHA JS App. A132-136). It applies to all residential lots under long-term lease, and guarantees the right to assign; the opportunity to cure default; the right to extend to a remaining term of 55 years, a formula for determining rent upon extension; and other rights. Part III *does not restrict* the lessee-acquirers, *i.e.*, persons acquiring the lessors' interest under the statute, or protect lessees under leases made by those persons unless the new leases are for periods of 20 years or longer.

[8] It is significant that none of the appellants included in their Appendices *any* legislative history—an inclusion which they would have been expected to make in view of their reliance upon legislative findings. The reason for their omission is that the legislative history simply did not include the type of support that ordinarily precedes important legislation of the type encountered here.

in an attempt to bolster the constitutionality of the Act after the Hawaii Attorney General had brought suit to have the Act declared unconstitutional on the ground, among others, that it failed to satisfy the Public Use requirement of the Eminent Domain Clause.[9] As the Court of Appeals properly recognized, the findings were mere rationalizations for a clearly private taking.

The true objective of the statute was exposed at its inception, when it was described as a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots." [10] The statute's private purpose is indeed evident throughout its provisions,[11] which, briefly summarized, are:

(a) The statute applies to residential lots, located in "development tracts," held under leases for terms of twenty years or more.[12] "Development tracts" are defined as not less than five acres in size.[13]

(b) Proceedings to take the fee simple title to lots may never be commenced on the state's initiative, but may be commenced *only* if and after lessees of at least 25 lots or 50% of the lots (whichever is less) in a development

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[9] The suit was not pursued to judgment on the merits. *See* note 36, *infra*.

[10] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859.

[11] Some of these provisions were declared unconstitutional by the District Court. *See* notes 17, 18, and 40, *infra*. The statute was changed by amendments enacted subsequent to the filing of the complaint. These amendments do not affect the issues presented on this appeal: 1979 Haw. Sess. Laws, Act 227, 1980 Haw. Sess. Laws, Acts 39 and 107, and 1983 Haw. Sess. Laws, Acts 203, 204, and 270. *See* notes 17 and 18, *infra*.

[12] Haw Rev. Stat. §§ 516-21, 516-1(5) & (11).

[13] Haw. Rev. Stat. § 516-1(2). Most residential lots are 6,000 to 12,000 square feet in area. Allowing for streets, not more than six lots can be developed per acre.

tract have applied to the HHA to purchase the fee interest in their lots.[14] Expenses incurred by the HHA in the proceedings are to be paid by the applying lessees, who are required to forward a deposit for that purpose.[15] The HHA may acquire the fee interest in all or some of the lots in a tract when, after a hearing, it finds that such acquisition will effectuate the purposes of the statute.[16] Since the only purpose to be effectuated is to place the ownership of the lots in the hands of the lessees, the HHA's hearing and resulting findings are ministerial in nature, as evidenced by experience under the statute to date.

(c) After the public purpose "determination," the HHA instructs the lessor of the lots and the lessees to negotiate the "just compensation which the lessees will pay" for the fee simple title. If the parties fail to agree, the HHA directs the parties to commence compulsory arbitration.[17] Statutory formulae are provided for determination of compensation.[18]

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[14] Haw. Rev. Stat. § 516-22.

[15] Haw. Rev. Stat. § 516-33.5.

[16] Haw. Rev. Stat. § 516-22. Since the HHA need not acquire all lots in the development tract, lots are designated for acquisition in a checkerboard pattern based solely upon the wishes of individual lessees who desire and are financially able to purchase fee title to their lots.

[17] Haw. Rev. Stat. Chapter 516, Part IIA, §§ 516-51 through 516-55. The compulsory arbitration provisions of this part were declared unconstitutional by the District Court, and the HHA was permanently enjoined from taking further action with respect to this statutory provision. No appeal was ever taken from this ruling. *See* note 40, *infra*. After this ruling, the legislature amended the statute to repeal the compulsory arbitration provisions and to provide for a mandatory negotiation. The validity of this amendment and the amendment mentioned in note 18, *infra*, remains to be tested, but are immaterial if Part II of the statute (Haw. Rev. Stat. §§ 516-22 through 45) is declared unconstitutional by this Court.

[18] Haw. Rev. Stat. §§ 516-1(14) and 516-24. Exclusive use of these formulae was ruled unconstitutional by the District Court. *See* note 40, *infra*. After this ruling, and purportedly in compliance

(d) The HHA obtains from applicant lessees information verifying that they are "qualified" [19] to purchase the lessor's fee simple title and financial statements or evidence demonstrating their ability to pay the probable prices at which fee simple titles to their lots will be acquired and transferred to them through the condemnation proceedings.[20] The HHA then "designates" for acquisition and thereafter institutes a condemnation action against the lots for which qualified lessees have applied.[21] While the HHA is the nominal party plaintiff, the lessees, as the real parties in interest, are named (along with the lessor) as parties defendant.[22] Upon conclusion of the condemnation proceedings, the fee simple title to the lots is transferred to the applicant lessees upon their payment of the awarded compensation.[23] The remaining lots in the development tract are not involved

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with it, the legislature amended the statute to preclude sole reliance upon the formulae. 1980 Haw. Sess. Laws, Act 107, § 2 (codified at Haw. Rev. Stat. § 516-1(14)).

[19] Haw. Rev. Stat. § 516-33. Among other requirements, the applicant lessee must be the owner of the residence upon the leased premises and have a bona fide intent to live in the development tract *or be a resident of the state of Hawaii.* Haw. Rev. Stat. § 516-33(2). The legislature thus gave its tacit approval to use of Chapter 516 for speculative purposes, by its recognition that many lessees would not reside in the purchased premises but would instead rent, lease, or sell the same.

[20] Haw. Rev. Stat. § 516-33(4).

[21] Haw. Rev. Stat. §§ 516-22 and 23.

[22] According to the HHA, the lessees are named as defendants because they "have a direct interest in the amount of compensation and damages, if any, to be awarded * * *, in that said amount will ultimately be borne by the lessees who purchase the houselots * * *." *E.g.*, Complaint, ¶ 3, filed in 1980 in *Hawaii Housing Authority* v. *Midkiff*, Civil No. 60465 (Haw. Cir. Ct.), a copy of which is attached as Exhibit "A" to Trustees' Memorandum in Opposition to Motion for Partial Summary Judgment, filed in the District Court (Record, at 158).

[23] Haw. Rev. Stat. § 516-30.

in the statutory proceedings, but may be substantially affected in fact.

(e) Funds to satisfy the condemnation award are supplied entirely by the lessees. While the statute authorizes state bonds to be issued and funds to be appropriated for HHA acquisitions, no bonds have been issued in the 16 years of the statute's existence, and only token funds have been appropriated.[24]

(f) Part III of the statute, often referred to as the "Lessees' Bill of Rights," is not at issue in this litigation. It should be noted, however, that Part III *does not restrict* the lessee-acquirers from reimposing the same long-term leaseholds the legislature has supposedly found so harmful, or protect new lessees under their new leases unless the new leases are for periods of 20 years or longer.[25]

(g) Part IV of the statute sets out legislative findings and declarations, adopted in 1975 when the legislature sought to strengthen the statute's claims to constitu-

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[24] The first attempt to provide public financing occurred in 1971 Haw. Sess. Laws, Act 215, which authorized the issuance of $5,000,000 in general obligation bonds. As noted below (*see* note 36, *infra*), the Hawaii Attorney General challenged the constitutionality of the Act and use of public credit to finance acquisitions. The bonds were never issued. In 1975, the legislature appropriated $1.3 million for a test case aimed at a small subdivision. The test case was settled, and this money remains unspent.

[25] Haw. Rev. Stat. §§ 516-61 and 516-1(5). Indeed, other state statutes providing for disposition of public lands make it apparent that there is not now and never has been any government policy against the practice of leasing for a long period, whether of residential or other lands. Disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32. Leasing of public lands for residential purposes is specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Statutory requirements concerning the provisions of leases of public lands make such leases more restrictive than those made by private landowners who have conformed their lease form to FHA requirements.

tional legitimacy.[26] These *inter alia* recite a concentration of land ownership in a few hands;[27] claim that the practice of leasing rather than selling has resulted in a shortage of "fee simple residential land";[28] refer to the high cost of land and the need to check the "inflationary trend of land;"[29] and assert the right of the state to "exercise the power of eminent domain" for the purpose of "allowing lessees under long-term leases of residential land to purchase * * *"[30]

Further emphasizing the private purposes of the statute is its history of amendments, which have progressively facilitated the acquisition by private lessees and relegated the role of the HHA to the purely ministerial function of acting as a conduit for transfer of title. For example, the original statute authorized the HHA to condemn only *entire* development tracts, but a 1975 amendment allows condemnation of only those lots which lessees have applied to purchase.[31] In 1976, probably recognizing that the fee simple residential properties are indeed readily available (notwithstanding "findings" to the contrary), the legislature deleted the requirement that the HHA find a shortage of fee simple residential properties before designating lots for acquisition.[32] In 1978, the legislature made it possible for lessee-speculators to take

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[26] The legislature recited that although the Act "has been in effect for nearly six years it has not been implemented for reasons including possible legal or constitutional difficulties * * *." 1975 Haw. Sess. Laws, Act 186, § 1.

[27] Haw. Rev. Stat. § 516-83(a)(1).

[28] Haw. Rev. Stat. § 516-83(a)(2).

[29] Haw. Rev. Stat. § 516-83(a)(7).

[30] Haw. Rev. Stat. § 516-83(a)(9).

[31] *Compare* Act 307, § 11 *with* 1975 Haw. Sess. Laws, Act 184, § 2(6) (codified at Haw. Rev. Stat. § 516-22).

[32] 1976 Haw. Sess. Laws, Act 242 § 2 (codified at Haw. Rev. Stat. § 516-22).

advantage of this statute by removing the requirement that the lessee-acquirer live on the lot to be condemned.[33]

C. The Present Federal Court Litigation

1. *Background*

The initial version of Chapter 516 was enacted as Act 307 in 1967.[34] For nearly a decade the statute lay dormant,[35] in part due to unanswered questions regarding its constitutionality,[36] and in part due to the continuance of low rents fixed at the inception of the lease terms.[37]

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[33] 1978 Haw. Sess. Laws, Act 140, § 2 (codified at Haw. Rev. Stat, § 516-33(2)). Another recent amendment substitutes mandatory negotiation of price for mandatory arbitration. This preserves the lessee's opportunity to withdraw before condemnation if the negotiations indicate he may be compelled to pay a price not to his liking. 1980 Haw. Sess. Laws, Act 107, § 3 (codified at Haw. Rev. Stat. § 516-51).

[34] 1967 Haw. Sess. Laws, Act 307 (hereinafter "Act 307").

[35] Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (Preliminary Injunction Hearing, April 24-27, 1979 (Tr. at 217)).

[36] Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality. Trustees filed two such actions in 1967 (*Midkiff* v. *Hasegawa*, No. 4727, and *Midkiff* v. *McCormack*, No. 4728) and another residential lessor filed a similar action (*Davis* v. *Finance Realty*, No. 4735). The HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than they could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on grounds, among others, that it provided for taking private property for non-public purposes. This suit, too, was dismissed without prejudice. *State* v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

[37] In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or

After a series of liberalizing amendments to improve the lessees' litigation position,[38] the HHA began proceedings in 1978 leading to the involuntary condemnation of Trustees' fee title in various lots. These included a direction by the HHA on January 22, 1979, that Trustees submit to mandatory arbitration for *prima facie* determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in Honolulu for the taking of the fee simple title.[39] Trustees instead brought the present action for injunctive and declaratory relief.

2. *The proceedings below*

Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.[40] The

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arbitrated at the end of the fixed rent period. Rents fixed in many household tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing the fee title.

[38] *See, e.g.*, notes 31-33 and accompanying text, *supra*.

[39] Decision on Motion for Preliminary Injunction (HHA JS App. A102 n.52). Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew its intervention in this lawsuit.

[40] Trustees' complaint asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint also alleged that the statute does not vest power in the state or its agency, the HHA, to make the essential determination as to which, if any, lots should be taken; but, rather, unconstitutionally delegates that power to lessees. Further, it alleged that the statute contravenes the Contract Clause of the Constitution because it abrogates the terms of pre-existing lease contracts.

Finally the complaint asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute. These, as noted above, were held unconstitutional by the District Court and are not in issue before this Court.

District Court, on February 28, 1979, issued a Temporary Restraining Order against HHA enforcement of the Act (HHA JS App. A78 & n.5), which it modified, on March 27, 1979, so as to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (*id.*). After a hearing on Trustees' motion for a preliminary injunction, the District Court handed down its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered on June 8, 1979. It permitted condemnation of the fee simple title to leasehold lots, but restrained compulsory arbitration and exclusive use of the valuation formulate provided by the statute.[41]

Thereafter, HHA and intervenors,[42] without claiming that abstention was appropriate for any reason, filed motions for partial summary judgment asking the District Court to uphold the constitutionality of the statute on the basis of the legislative findings. Without affording Trustees an opportunity to present any evidence to the contrary, the District Court filed its decision upholding the constitutionality of the statute.

The District Court's decision.[43] The District Court denied Trustees' demand for a trial of the disputed issues, reaffirmed its prior rulings concerning mandatory arbitration and the valuation formulae, and, subject to such rulings, granted summary judgment against Trustees, holding that the condemnations authorized by

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[41] There were no state court condemnation proceedings against Trustees even filed by this time. The first such suit was filed in September 1979. (HHA JS App. A30 (Poole, J.)).

[42] On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene. Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions.

[43] The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*).

Chapter 516 were for a public purpose. It held that compelling "redistribution" (HHA JS App. A.74)[44] of the lessor's property interests to lessees who elected to acquire them is within the state's police power, and "hence" the takings are for a public purpose and constitutional (HHA JS App. A67-A73). Alternatively, it held that if this conclusion was erroneous, the legislature's "economic findings" furnished an adequate basis for upholding the statute (HHA JS App. A74-A75).[45] Trustees appealed.

The Court of Appeals' decision. The Court of Appeals, by a divided vote, reversed. The court first concluded that the District Court had not erred by not *sua sponte* abstaining from decision on the merits of the Trustees' claims.[46] On the merits, the Court ruled that Chapter 516 violated the Public Use Clause because the Act did not foster any purpose other than to transfer land from one private party to another, and this purpose was barred by the Public Use Clause.[47] Because the Act simply mani-

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[44] The use of this phrase throughout the District Court's opinion is unwarranted. No "land" redistribution is involved. The lessees are in possession, and only the "fee simple" interest is "redistributed"—i.e., taken from the owner and transferred to those lessees who apply and pay therefor.

[45] Finally, the District Court granted the HHA and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980.

[46] No one had seriously argued to the District Court or the Court of Appeals that abstention on the merits was required; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After receiving post-argument briefing on this issue, the Court of Appeals concluded that abstention would have been improper (HHA JS App. A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).

[47] The Court of Appeals concluded: " ' "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain * * *. For if the use be not public

fested and promoted a state-adopted preference for private land ownership, Chapter 516 failed the requirements of the Public Use Clause.[48]

SUMMARY OF ARGUMENT

The Ninth Circuit's narrow holding that Chapter 516 violated the Public Use Clause of the Fifth and Fourteenth Amendments to the United States Constitution is manifestly correct and does not warrant further review by this Court. The court applied well-established precedent in two comprehensive opinions giving detailed consideration to all the arguments made below and repeated here by appellants. Thereafter, the full Court of Appeals denied *en banc* review. The court's application of the law to this particular statute does not warrant further review.

A. Chapter 516 is unique, without historical precedent or contemporary analogue. While every state faces the same population-land use problems caused by an expanding population and a finite territory (and some are in far worse straits than Hawaii), no other state has adopted a law comparable to this one. The issues in this case therefore are unique and cannot be expected to recur. Moreover, the Court of Appeals' resolution of those issues did not establish a new principle of law. To the contrary, that decision is a straightforward application of well-settled precedent to this unique statute. Therefore, the Ninth Circuit's decision will have no impact beyond the narrow confines of this particular statute and these facts.

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* * * the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required" '" (HHA JS App. A20, quoting *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905), quoting in turn *Tracy* v. *Elizabethtown, Lexington & Big Sandy R.R.*, 80 Ky. 259, 265 (1882); *see id.* at A33 (Poole, J.), quoting *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937)).

[48] Because of the court's ruling, it did not consider Trustees' other arguments.

The Ninth Circuit's ruling, furthermore, does not conflict with any decision of this Court or any other federal Court of Appeals. The Ninth Circuit faithfully observed this Court's decisions, and gave close consideration to the judgment made by the Hawaii legislature as to the need for this statute and to the alleged purposes served thereby. Contrary to appellants' suggestions, the Ninth Circuit did not overlook or undervalue any of these matters. It simply concluded that Chapter 516 did not square with this Court's decisions and with the principle, consistently expressed in those decisions, that the Public Use Clause does not permit a state simply to transfer property from one private party to another, notwithstanding payment of just compensation. Because appellants have not argued (and could not do so consistently with this Court's decisions) that such a transfer is constitutionally permissible, there is no need for full, plenary review of the Court of Appeals' application of that rule to this statute.

B. Finally, Trustees also presented several Due Process and Contract Clause arguments to the Court of Appeals, which that Court found unnecessary to consider, but each of which independently supports the judgment of that court. Because any one or all of these grounds would require affirmance, further review of the Court of Appeals' decision is unnecessary.

ARGUMENT

So as not to unduly burden the Court, Trustees will not repeat here the Argument already made in their Motion to Affirm in No. 83-236 with regard to the correctness of the ruling below on abstention. The Argument is instead incorporated herein by reference. Trustees will address in this Motion only appellants' arguments relating to the constitutionality of Chapter 516.

I. THE COURT OF APPEALS' NARROW DECISION IS MANIFESTLY CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS ON PUBLIC USE

1. The Eminent Domain Clause of the Fifth and Fourteenth Amendments prohibits the "tak[ing]" of private property, even when accompanied by payment of "just compensation," unless the taking is for a "public use."[49] The Public Use requirement therefore makes certain condemnations forbidden, even where the government is willing to pay for them. Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365. In so doing, that requirement not only protects individuals' property rights from government depradation—protection long regarded as "a vital principle of republican institutions" (*Chicago, Burlington & Quincy R.R.*, 166 U.S. at 235-236)—but also assures that one group of citizens does not capture governmental power for its own benefit at the expense of other individuals (*see Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)).

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[49] The Eminent Domain Clause provides that "nor shall private property be taken *for public use*, without just compensation" (U.S. Const. amend. V; emphasis added), and is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *E.g., Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897). Hereafter, we shall use the term the "Eminent Domain Clause" to refer to the entire quoted provision, the "Public Use requirement" to refer only to the italicized portion, and the "Just Compensation requirement" to refer to the last portion of the Clause.

For these reasons, the Public Use requirement of the Eminent Domain Clause forbids the State from transferring property from *A* to *B* for *B*'s private use and benefit, even though just compensation is paid. That principle, as the Court of Appeals recognized, is clear from the text of the Clause itself,[50] from its historical background,[51] and from the decisions of this Court[52] (HHA

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[50] By its terms, the Public Use requirement recognizes as valid only those takings serving a public, not a private, use. *See* Epstein, *supra*, 1982 Sup. Ct. Rev. at 365. Any other interpretation—such as that the requirement is merely precatory, or that it limits only those instances in which just compensation must be paid—either renders the Public Use requirement superfluous or makes the Just Compensation requirement virtually worthless. Both interpretations, however, are fatally inconsistent with black-letter constitutional law requiring every word and phrase in the Constitution to be given effect. *E.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333-336 (1816) (Story, J.).

[51] *See* authorities cited in Judge Alarcon's opinion for the Court of Appeals, at HHA JS App. A5-A10.

[52] *See, e.g.*, *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937); *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 159 (1896); *Cole* v. *LaGrange*, 113 U.S. 1, 7 (1885); *Olcott* v. *Supervisors*, 83 U.S. (16 Wall.) 678, 689 (1873); *see also United States* v. *Carmack*, 329 U.S. 230, 239 (1946); *Brown* v. *United States*, 263 U.S. 78, 84 (1923); 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 7.1, at 7-4.1, §§ 7.1[1] & [2] (rev. 3d ed. 1981 & Supp. 1982); Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 595 (1972).

Moreover, this limitation, as the text states (*see* note 50, *supra*), is independent of the requirement that any taking be accompanied by "just compensation." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 252. In fact, this Court's decision that the Fourteenth Amendment Due Process Clause incorporated the Fifth Amendment Just Compensation requirement so held only after reaffirming the Court's prior rulings that a State could not take private property without satisfying the Public Use Clause. *Compare Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. at 235-236 (Public Use requirement limits State's eminent domain authority) *with id.* at 241 (Just Compensation requirement requires the State to pay for otherwise lawful takings).

JS App. A5-A20; *id.* A33-A34 (Poole, J.)). Therefore, it is hardly surprising that, for over a century, this Court has consistently reaffirmed the principle that, as Justice Brandeis once acknowledged for the Court, "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80; *see* cases cited in note 52, *supra*.

To be sure, the concept of a legitimate "public use" has expanded over the years so as to include objectives benefitting the public as a whole, rather than simply uses of property accomplished entirely by the government. *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700 (1923). But whether the test is phrased in terms of use by or for the public, the taking of property from one to give it to another cannot be constitutionally justified.[53] The taking must clearly and persuasively be for the benefit of the public, and it must affect the use of the land in some way which serves a public purpose.

The only question, then, is whether the Court of Appeals properly applied that principle to this specific statute. In this case, the court correctly concluded that, notwithstanding the alleged interests HHA and the intervenors have advanced in support of Chapter 516, the unmistakeable purpose and unquestionable effect of that Act is precisely what the core principle of the Public Use requirement forbids.

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[53] Whether the test is stated as public-use or public-purpose, there is one thing about which American courts have always said they were adamant. *Eminent domain cannot be used to transfer property from one private person to another.* That would violate the most fundamental Lockeian principle that governments were instituted to protect every man's property against his neighbor's depradations. [Stoebuck, *A General Theory of Eminent Domain*, *supra*, 47 Wash. L. Rev. at 595 (emphasis added); *see generally* 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, *supra*, § 7.2.]

2. Judge Poole pinpointed the central flaw in Chapter 516 when he noted that "the only variable presented is whether A or B holds title to the land * * *" (HHA JS App. A38). While the Court of Appeals' interpretation of the Act is entitled to substantial deference,[54] that conclusion is evident from the text of the Act itself. The Act neither provides for, requires, presupposes, nor envisions any change of any sort in the possession of the acquired leaseholds or the use to which the acquired leaseholds or their environs will be put. In addition, the Act imposes no restrictions upon a lessee's right after acquiring the property, in turn, to lease his home and newly-acquired property, notwithstanding the state's professed interest in eliminating leaseholds on this land. In other words, all that the Act potentially accomplishes is to trade one lessor with 100 separate leases each for 55 years, for 100 lessors each with one lease for 55 years. The condemnations authorized by the Act, furthermore, may take place only at the behest of the private beneficiaries thereof who may be animated by nothing more than a naked desire to expropriate the lessor's title.[55] Finally, the legislative history of the Act exposes its true objective as being simply a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots."[56] Accordingly, unless the Public Use requirement is to be excised from the text of the Fifth Amendment, the Court of Appeals' ruling must be upheld.

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[54] *See, e.g., Pacific Gas & Elec. Co.* v. *State Energy Resources Conserv. & Dev. Comm'n*, 103 S. Ct. 1713, 1727 (1983).

[55] That the takings authorized by Chapter 516 can occur only where the private beneficiaries thereof set the process in motion is independently significant in determining whether a taking satisfies the Public Use requirement. *United States* v. *Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

[56] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859.

3. Nothing in appellants' argument comes to grips with that conclusion. Instead, appellants have attempted to deflect attention from the Public Use requirement, its historical background, and underlying policies, to the doctrine of substantive due process by casting Chapter 516 as a garden variety regulatory measure. From that vantage, appellants then castigate the Court of Appeals' decision as an attempt to disinter *Lochner* v. *New York*, 198 U.S. 45 (1905). In both instances, however, appellants' attempt to avoid the teaching of this Court's Public Use decisions must fail.

(a) Of the 24 decisions by this Court cited by appellants on the taking issue (as opposed to abstention), 16 are not even eminent domain cases. As support for the argument that the redistribution by eminent domain of property from *A* to *B* is wholly acceptable, HHA relies (HHA JS 15-19) upon cases such as *Miller* v. *Schoene*, 276 U.S. 272 (1928), in which this Court held no taking had occurred. This reliance fails to recognize the crucial distinction between government regulation and government condemnation. The redistribution through *regulation* of the wealth or property of one group for the benefit of another need not satisfy the Public Use (or Just Compensation) requirements precisely because regulation falling short of a taking does not engage the requirements of the Eminent Domain Clause *at all*. Only "takings," not regulation, must satisfy the requirements of the Eminent Domain Clause.

Appellants' argument also attempts to resurrect the position rejected in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 417 (1922), that "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking" (Brendeis, J., dissenting). The principle adopted in *Mahon*, and often reiterated since, is "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. That principle, dividing regulatory legislation not subject to the requirements of the

Eminent Domain Clause from those actions which are, has been reaffirmed in three different contexts within the last few years. *See United States* v. *Security Indus. Bank*, 103 S. Ct. 407, 410 (1982) (Eminent Domain Clause limits Congress' authority under Bankruptcy Clause); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982) (Eminent Domain Clause limits state's police power); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-73 (1979) (Eminent Domain Clause limits Congress' authority under the Commerce and Admiralty Clauses).[57]

(b) Appellants further contend that the majority gave insufficient weight to the unique history and policy considerations supporting Chapter 516.[58] But appellants

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[57] HHA's reliance (HHA JS 13) upon *Wilson* v. *Iseminger*, 185 U.S. 55 (1902), and *Stewart* v. *Gorter*, 16 A. 644 (Md. 1889), as support for this argument is misplaced. In neither case did the statute "take" any property. The Pennsylvania statute in *Wilson* decreed that, if no demand for rent had been made for 21 years, release of the lessor's reversionary interest was presumed. As this Court, in discussing *Wilson*, recognized two Terms ago in *Texaco, Inc.* v. *Short*, 454 U.S. 516, 527-530 (1982), the transfer of property after the owner has abandoned it does not constitute a "taking" under the Eminent Domain Clause. *See* 454 U.S. at 530 ("It is the owner's failure to make any use of the property—and not any action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation"). Similarly, the Maryland statute at issue in *Stewart* simply provided that where a lessor *in subsequently executed leases chose* to lease the land for more than 15 years, the leases would be subject to a tenant's right to purchase the reversion. The wholly prospective operation of that statute renders *Stewart* materially different from this case. In fact, the Maryland Court of Appeals later ruled that a retroactive change in already-executed leases would violate the Contract Clause, and limited *Stewart* to prospective leases only. *See Marburg* v. *Mercantile Bldg. Co.*, 140 A. 836, 839 (Md. 1928). Finally, that Acts of this type may be a valid exercise of the State's police power does not insulate them from challenge under the Eminent Domain Clause. *See Security Indus. Bank*, 103 S. Ct. at 410; *Loretto*, 102 S. Ct. at 3171; *Kaiser Aetna*, 444 U.S. at 172-173.

[58] Contrary to appellants' suggestions, a legislature's or state court's declaration of "public use" and its "findings" that various

have confused the weight to be given legitimate state interests with the legitimacy of those interests themselves.[59] HHA's and intervenors' after-the-fact rescue attempt to impact a public use to this Act overlook the essential purpose and effect of the Act and focuses, instead, on the ancillary benefits that the state hopes to attain from its operation. That approach stands the Public Use requirements on its head by permitting any condemnation—even those unabashedly intending simply to transfer property from *A* to *B*—so long as some incidental benefit therefrom allegedly flows to the state or public. That has never been the law, and appellants' roundabout effort to have this Court adopt such a principle ignores the text, history, and purpose of the Public Use requirement, as well

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economic and social benefits will follow from a particular exercise of the state's eminent domain power are manifestly not conclusive upon a federal court. To the contrary, this Court has consistently emphasized that, despite the deference due such judgments, the "public use" question is a judicial one, which must independently be determined by a federal court in order for the state's condemnation to pass muster. *E.g.*, *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 705-706; *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598, 606 (1908); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. at 159; *see also* 2A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, *supra*, § 7.4.

[59] We question whether HHA may even advance interests such as the need to avoid "consequent disruptions in lawful social behavior" (Haw. Rev. Stat. § 516-83(7); HHA JS App. A138) in support of the Act's constitutionality. It is, of course, beyond question that a party may not be forced to sacrifice his federal constitutional rights simply to keep a mob at bay. As a unanimous Court held when presented with a similar argument, "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * '[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.'" *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (citation omitted); *cf. Loretto*, 102 S. Ct. at 3178 n.17 (" a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation").

as this Court's decisions interpreting its reach (HHA JS App. A5-A20; pages 16-19, *supra*, and cases cited therein).[60]

(c) The Ninth Circuit's decision does not conflict with any decision of this Court or any other Court of Appeals.[61] As the court noted (HHA JS App. A16-A19; *id.* A34 (Poole, J.)), its holding that Chapter 516 did not fulfill a valid public purpose is in accord with this Court's ruling in *Berman* v. *Parker*, 348 U.S. 26 (1954), as well as the other cases cited by appellants (*e.g.*, HHA JS 20-21).[62] None of these decisions undermined this

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[60] Appellants repeatedly (albeit obliquely) make reference to the fact that Hawaii is an island to buttress their argument that the peculiar conditions prevailing there justify Chapter 516. But the fact that Hawaii is surrounded on all sides by the Pacific Ocean rather than on one side (like Oregon), or rather than being landlocked (like Utah) adds nothing to the fact that Hawaii, like *every* state, has a fixed and finite amount of territory. In fact, other states have far worse population-land use problems than Hawaii, such as Nevada where 86.5% of the land is *federally* owned (excluding Indian reservations and other federal trust properties) and therefore not subject to the state's eminent domain power, with much of the remaining land uninhabitable because of water scarcity. *United States* v. *New Mexico*, 438 U.S. 696, 699 n.3 (1978).

In any event, just as there is not one law for Athens and another for Rome, surely there is not one Eminent Domain Clause for the Hawaiian Islands and another for Manhattan Island. A statute simply transferring land from *A* to *B* for *B*'s private use and benefit is as unconstitutional in the one case as in the other.

[61] Appellants' challenge to the Court of Appeals' distinction between federal and state exercise of eminent domain is irrelevant to this case because Trustees have never challenged any federal condemnation. What the appropriate standard is for federal takings must await a federal condemnation proceeding.

[62] The Court of Appeals did not overlook any decision of this Court and discussed at length every case cited by appellants. In so doing, the Court of Appeals correctly noted that none of the takings considered in any of the cases cited by appellants had as tenuous (or imaginary) a connection with any legitimate public purpose as does Chapter 516 (HHA JS App. A12-A20; *id.* A33-A34

Court's earlier rulings that the simple transfer of property from *A* to *B* for *B*'s private use and benefit is not a *legitimate* public purpose, however rationally that goal is advanced by the applicable legislation. The Court of Appeals' factual finding here therefore does not conflict with any of this Court's rulings.[63]

While appellants point to dicta in *Berman* as supporting their position, the facts of that case actually demonstrate the extraordinary difference between what the Court was ruling upon there and what appellants would have the Court rule here. In *Berman* (a) *all* of the property that was taken was commercial property, (b) the taking was pursuant to a comprehensive, cohesive public plan, (c) the purpose of the taking was to redevelop a

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(Poole, J.)). And the historical materials cited by HHA (HHA JS A12-A13) refer to entirely different statutes, enacted over 100 years ago, that have since passed into obscurity. Further review is unnecessary to consider this material.

[63] The Ninth Circuit's ruling here also does not conflict with the ruling in *People of Puerto Rico* v. *Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946). Like the Court of Appeals here, the First Circuit recognized that "a taking of property from one, for the purpose of transferring it to another, without anything more, [does not] conform to due process of law" (156 F.2d at 323, citing *Brown* v. *United States*, 263 U.S. at 84). There was, in that case, a change not only of possession but of use. 156 F.2d at 319, 323.

Appellants also claim that the decision below conflicts with *Guam* v. *Moylan*, 407 F.2d 567 (9th Cir. 1969), and *Poletown Neighborhood Council* v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*). *Moylan* involved an attempt to "establis[h] order out of the chaos" (407 F.2d at 568) created during World War II by the heavy bombing of Guam's capital city during the American invasion of the island, after which "little was left standing in the harbor area." *Id.* at 567. That decision, from the same Circuit that decided this case, is not remotely pertinent to this case. And the court in *Poletown* acknowledged that "condemnation for a private use cannot be authorized whatever its incidental public benefit" (410 Mich. at 634, 304 N.W.2d at 458), which was the precise holding below. The decision below therefore does not conflict with either of these decisions.

large area in order to eliminate and prevent slum and substandard housing conditions, (d) the property was actually taken by the Government and then resold or leased, and (e) the reselling or leasing was subject to carefully drawn conditions designed to accomplish the purposes of the anti-slum Act. *None* of these five factors is present in the instant case.

II. THE COURT OF APPEALS' JUDGMENT IS INDEPENDENTLY SUPPORTED BY SETTLED DUE PROCESS AND CONTRACT CLAUSE DOCTRINE.

In addition to the argument that Chapter 516 violated the Public Use requirement of the Eminent Domain Clause, appellees raised several other separate grounds for the same result before the District Court and Court of Appeals.[64] Although the Court of Appeals found it unnecessary to reach these issues, each independently supports its judgment. Further review is therefore unnecessary for these reasons as well.

A. The Due Process Clause

1. The Due Process Clause forbids the State from subjecting a party's already-recognized property rights to "so arbitrary a thing as taste" (*Eubank* v. *City of Richmond*, 226 U.S. 137, 144 (1912)) by delegating to private parties the right arbitrarily to interfere with another's lawful use of his property. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 121-122 (1928); *Eubank*, 226 U.S. at 143-144.[65] The Court of

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[64] *See* Appellants' Opening Br. 33-46; Appellants' Reply Br. 19-23; Record Excerpts in the Court of Appeals 255, 260-65, 267-73.

[65] Stressing the intrusive and standardless character of such a delegation, *Eubank* struck down a local zoning ordinance delegating to the owners of two-thirds of the property abutting an affected street the power to set building lines. 226 U.S. at 143-144. *Eubank* was later followed in *Roberge*, which invalidated a similar delegation for the same reasons. 278 U.S. at 121-122.

As we have already pointed out (page 19, *supra*), this delegation of indiscriminate and standardless eminent domain power fatally

Appeals correctly recognized that Haw. Rev. Stat. § 516-22 [66] delegates to lessees essentially the same absolute and standardless state power found constitutionally unacceptable in *Eubank* and *Roberge*.[67] Although the Ninth Circuit did not have to reach this Due Process issue in its decision,[68] it is difficult to imagine a stronger case for application of those decisions than this one. Trustees' current use is manifestly entitled to due process protection,[69] and the power delegated by the Act to private parties entitles them to expropriate Trustees' fee simple title rather than merely regulate their use thereof as in *Eubank*, while blessing this expropriation as a proper public use (*see* No. 83-236 Motion to Affirm, pp. 12-14).[70]

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undermines appellants' claim that the Hawaii laws serve a legitimate public purpose. That same flaw also renders these laws invalid under *Eubank*.

[66] Section 516-22 provides, in part, that "[HHA] may designate all or a portion of a development tract for acquisition and acquire leased fee interests * * * *after* twenty-five or more lessees or the lessees of more than fifty percent of the residential lease lots within the development tract, whichever is the lesser, have applied to the authority to purchase the leased fee interest * * *" (HHA JS App. A118-A119; emphasis added). *See* page 6, *supra*.

[67] HHA JS App. A32 ("[u]nder [§ 516-22], the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase"; Poole, J.).

[68] Had it done so, its characterization of Section 516-22 strongly suggests that it would have found *Eubank* controlling. *See* note 67, *supra*.

[69] Trustees' right, as a legitimate incident of ownership, to rent their property rather than sell is unquestionably entitled to constitutional protection. *See Roberge*, 278 U.S. at 121 ("[t]he right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution"). Even Chapter 516 recognizes the legitimacy of such leasing; not only are the current leases undisturbed until a lessee seeks condemnation, but the Act does not bar the lessees from adopting the same leasing scheme as now exists.

[70] That compensation is awarded cannot rehabilitate the patent due process violation in this case because (1) "it is the state system

2. State laws regulating land use, like all state legislation, must rationally further a legitimate state interest. *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928); *see Moore* v. *City of East Cleveland*, 431 U.S. 494, 514, 520-521 (1977) (Stevens, J., concurring in the judgment). These laws clearly fail that test. Of the purposes set forth in the statute (Haw. Rev. Stat. § 516-83)—to combat inflation, to satisfy the lessees' desires to own the fee simple title to their property, and to attack an alleged concentration of land ownership—only the first reason is legitimate, and the legislature's finding that transferring title will combat inflation is baseless as a matter of law or economics.[71] The latter two reasons, while rationally (even brutally) served by this legislation, manifest that the real and substantial purpose and effect of this statute are to do nothing more than transfer fee simple title from *A* to *B* for *B*'s private use and benefit (*see* HHA

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itself that destroys a [lessor's] property interest, by operation of law * * *" (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)), rather than "a random and unauthorized act by a state employee * * * not a result of some established state procedure" (*Parratt* v. *Taylor*, 451 U.S. 527, 541 (1981)); and (2) there is no " 'necessity of quick action by the State' " or any " 'impracticality of providing any predeprivation process.' " *Logan*, 455 U.S. at 436, quoting *Parratt*, 451 U.S. at 539. That HHA, under a different, properly-drawn statute, could itself make the judgment as to where and when condemnation proceedings should go forward is, of course, no answer. " 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972) (citation omitted).

[71] Unless the Hawaii legislature can alter the economics of supply and demand, transferring title cannot hope to lessen or cap inflation. The statute will not add a foot of land or a single house to the supply; it will not restrict the lessees' ability to lease or sell to others at whatever price they choose; and it will not provide for, and is not conditioned upon, the acquisition of title to a large enough group of lots, either in the aggregate or in any classification, to achieve any supposed anti-inflationary effect.

JS App. A21).[72] As that purpose is barred by the Public Use requirement of the Eminent Domain Clause (pages 17-18, *supra*), Chapter 516 plainly embodies nothing more than "a bare [state] desire to harm a politically unpopular group" which "cannot constitute a *legitimate* governmental interest." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *see Zobel* v. *Williams*, 457 U.S. 55, 62-64, 65 (1982).

B. The Contract Clause

Chapter 516 authorizes each lessee, through the instrumentality of the state's condemnation power, to elect to terminate his lease agreement by acquiring, over the lessor's objection, the lessor's reversionary interest.[73] As such, Chapter 516 violates the Contract Clause by insulating the lessees from their destruction of already-established private contracts. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977). In *Allied Structural Steel* and *United States Trust Co.*, this Court concluded that state laws modifying already-existing private contract rights violated the Contract Clause, notwithstanding the deference due state economic legislation.[74]

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[72] If any further confirmation of that fact were needed, it can be found, as Judge Poole did (HHA JS App. A32-A33; *see id.* A36), in the fact that the statute imposes absolutely no restriction upon a lessee's post-acquisition ability to engage in the same form of long-term leasing that the legislature has declared to be so harmful.

[73] Section 516-61 states that "[e]xcept as otherwise expressly provided, this part applies to all leases of residential lots existing and in force on June 24, 1967, and to all leases of residential lots executed thereafter. [¶] Notwithstanding any term, condition, or provision in any lease to the contrary, the lessee of a residential lot shall have all of the rights enumerated in this part" (HHA JS App. A132).

[74] *Compare Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296 (1983); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697 (1983).

All of the determinative factors identified in these cases are fully applicable here.[75] By retrospectively vesting lessees with the right to terminate both the contract in existence at the time of the initial application of the statute and the lessors' reversionary interests, Chapter 516 plainly violates the Contract Clause.

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[75] Chapter 516 (1) operates as a substantial impairment of contractual relationships (*Energy Reserves*, 103 S. Ct. at 704-705; *Allied Structural Steel*, 438 U.S. at 244-245); (2) it favors a narrow class, in derogation of the interests of a politically unpopular group (*Energy Reserves*, at 705; *Allied Structural Steel*, at 248-249 *see also Eagerton*, 103 S. Ct. at 2306); (3) it is not justified by a "broad and desperate emergency" situation, as was the case during the Great Depression (*cf. Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934)) justifying retroactive application of the Act (*Allied Structural Steel*, 438 U.S. at 249); (4) the Act imposes conditions that are not appropriately tailored to meet the emergency (*Blaisdell*) because lessees are free to impose the same restraints after their acquisition of the leasehold; and (5) the Act was designed to favor the State (*Energy Reserves*, 103 S. Ct. at 705-706 n.14; *United States Trust Co.*, 431 U.S. at 25-26) by freeing it from the obligation to meet its self-professed goals of guaranteeing housing to middle- and low-income residents, and the elderly, through government-operated public housing facilities.

CONCLUSION

For the foregoing reasons and for the reasons given in our Motion to Affirm in No. 83-236, the judgment of the Court of Appeals should be affirmed. Should this Court instead note probable jurisdiction, the Court should do so only with respect to the Public Use Clause question presented by appellants, for the reasons given in our separate Motion to Affirm in No. 83-236 regarding abstention.[78]

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[78] Should the Court decide to give plenary review to these cases, Trustees will of course raise the alternative grounds for affirmance noted above.

Nos. 83-141, 83-283

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court may hold facially void, for want of public use or purpose, a state statute authorizing takings in eminent domain, of land formerly available only under long-term leases, for ultimate purchase at fair value by those who live there—a statute enacted in order to end the severe economic distortion and widespread social hardship the state legislature found had arisen from a uniquely enduring concentration of land ownership in the hands of a few.

2. Whether a federal court may proceed to invalidate a state eminent domain statute on federal constitutional grounds despite pending state condemnation proceedings in which the federal plaintiff has invoked those federal grounds and has also argued that state law independently requires both the taking agency and state courts to reject the state legislature's findings of public use and purpose.*

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* The state defendants below were the Hawaii Housing Authority (hereinafter, "HHA" or "the State"), the Commissioners of the HHA (Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y.K. Sunn). Commissioners Tom, Tamura, and Chang have been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom has succeeded Mr. Sunn as Executive Director.

Intervenors-defendants given leave to intervene by the district court below were the following lessee associations: Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach)†; Kokohead Community Lease-Fee, Inc.†; West Marina Community Association†; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.†; Kamiloiki Community Association; Lunalilo Marine Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund; and Halawa Valley Estates Fee Conversion Corporation. (Those marked with a "†" are filing a separate brief in No. 83-236, which is consolidated with Nos. 83-141 and 83-283.

(footnote continued)

Plaintiffs below were the Trustees of the Bishop Estate (hereinafter, "Bishop Estate" or "Estate"): Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. Mr. Ching has since been succeeded by William S. Richardson. Mr. Midkiff was deceased shortly after the filing of this appeal; his successor has not yet been appointed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-141, 83-283

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLANTS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, dated March 28, 1983, from which this appeal is taken, is reported at 702 F.2d 788 (9th Cir. 1983) (per Alarcon and Poole, JJ.; Ferguson, J., dissenting), and is reprinted in the Appendix to the Hawaii Housing Authority's Jurisdictional

Statement at A1-63.* The Ninth Circuit decision reversed a judgment of the United States District Court for the District of Hawaii (per King, J.) (JA106-08), granting partial summary judgment to appellants (*id.* at ¶ 6). The opinion announcing that judgment, dated December 19, 1979, is reported at 483 F. Supp. 62 (D. Haw. 1979), and is reprinted at A64-76. The district court's decision on appellees' motion for preliminary injunction, dated May 8, 1979, is reported at 471 F. Supp. 871 (D. Haw. 1979), and is reprinted at A77-104.

JURISDICTION

The Bishop Estate brought this action for declaratory and injunctive relief in the United States District Court for the District of Hawaii under 28 U.S.C. §§ 1331, 1343, & 2201, and 42 U.S.C. § 1983. The district court granted partial summary judgment to the state defendants and the intervenors-defendants, rejecting the Estate's claim that the Hawaii Land Reform Act violated the Fifth and Fourteenth Amendments to the United States Constitution. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, declaring the Hawaii Land Reform Act invalid on its face. A105. Rehearing was denied June 17, 1983. A106. Appellants filed timely Notices of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit on July 15 and 19, 1983. JA166-68. Probable jurisdiction was noted and the cases consolidated for argument on October 31, 1983.

Because the Ninth Circuit's judgment invalidated a state statute on federal constitutional grounds, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).

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* References to the appendix to the HHA's Jurisdictional Statement (*i.e.*, the Appendix To The Jurisdictional Statement in No. 83-141), which was bound in a separate volume accompanying that Jurisdictional Statement, will be cited "A____." References to the separate Appendix to the Jurisdictional Statement submitted to the Court in No. 83-236 will be cited "Portlock A____." References to the Joint Appendix will be cited "JA____."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, is reprinted in full at A109-40. The text of the original 1967 Act, 1967 Haw. Sess. Laws Act 307, is reprinted in relevant part at A141-43. The relevant portions of 1975 legislation related to or amending the Act, 1975 Haw. Sess. Laws Acts 184, 185, and 186, are reprinted at A144-57. The Hawaii Eminent Domain Law, Haw. Rev. Stat. ch. 101, is reprinted in relevant part at A158-78.

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution freezes our fiftieth state into its feudal past. A central legacy of that past is a system of land ownership concentrated enduringly in the hands of a few. Those few large landowners, retaining a tight grip on the land, have chosen to lease rather than sell it to the many who make their homes there. Similar land monopolies, and the fetters they placed on freeholding, were widely broken in the original United States at the very beginnings of our republic. Whether Hawaii, having entered our union last, may be barred by the intervention of a federal court from freeing *its* land from monopolists' long-term leases—through a Land Reform Act providing for fully and fairly compensated takings—is the question to be decided here.

A. Why The Hawaii Land Reform Act Was Passed.

The Hawaii legislature enacted the Land Reform Act of 1967[1] after years of hearings, testimony, study, and drafting efforts[2]—to remedy the modern social and economic ills

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1 1967 Haw. Sess. Laws Act 307 (findings reprinted at A141-43). (Hereinafter, "Act 307").

2 As noted by the conference committee that reported the bill that became the 1967 Act, "The achievement sought by this bill is not novel. The intent of this bill . . . has been before the legislature for . . . years." Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799, 800. Indeed, the barriers posed to widespread residential land ownership by the land monopoly and the leasehold system in Hawaii were a continuing subject of acute legislative concern even before statehood. For instance, a 1955 Territorial Senate resolution called upon the large estates to divest their lands held "for investment and speculative purposes," in order "to release to the people" residential land for fee simple ownership. 1955 Haw. Sen. Reso. No. 49. A 1959 Territorial law, reenacted after statehood as 1961 Haw. Sess. Laws Act 6, provided for state acquisition of private land through eminent domain for residential development. And several bills drafted by the legislature after statehood would have required that long-term leases include options for tenants to purchase their leaseholds, *see* 1963 Haw. House Bill Nos. 24 & 409, but were defeated. The findings underlying each of these acts and bills were substantially similar to those underlying the 1967 Act, which itself followed "[n]umerous hearings . . . by legislative commit-

caused by a land monopoly the legislature viewed as the outmoded vestige of Hawaii's feudal past, "when all the lands in Hawaii were owned by the kings and chiefs and few others to whom the kings and chiefs parceled out parts of the lands."[3] Under that feudal land tenure system, which had origins as early as the first millenium A.D. and which was unified by King Kamehameha I in the eighteenth century, the hierarchy of landlord chiefs oversaw a multitude of tenants, from whom they were able to exact land, labor, and property to an extent denounced as oppressive by King Kamehameha III in his legal code of 1842. In an unsuccessful attempt to cure these ills, King Kamehameha III, in the Great Mahele of 1848, divided all the lands of his kingdom among the crown, the government, the chiefs, and the common people. But the chiefs received much of the land; the commoners, little. And the chiefs' lands, "[o]ver the years, passed into the hands of the small number of present day owners."[4]

This uniquely enduring concentration of land ownership, the legislature found in 1967, had long bred severe economic distortion and widespread social hardship in Hawaii. Demand for single-family houselots was rapidly increasing, especially in the urban areas where population growth and economic development was fastest.[5] But the oligopoly of major landowners, in

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tees at which the representatives of large, private landowners and others interested in the bill testified." Conf. Comm. Rep. No. 19, *supra*, at 800.

3 *Id.*

4 *Id.* As this lawsuit began, the grip of this small oligopoly remained tight. On Oahu, where the State's population is concentrated, three major landowners owned 58.4% of the land privately held on Oahu—nearly 40% of its total area. *See Midkiff v. Amemiya*, Civil No. 47103 (Haw. 1st Cir. June 29, 1978) (Finding of Fact No. 96). Portlock A213. The Bishop Estate alone owned 22.1% of all the privately held land on Oahu—over 15% of its total area. *Id.* (Finding of Fact No. 97). Portlock A213. And as the legislature found in 1975, three-fourths of the island's land area was owned by just 22 major landowners. *See* 1975 Haw. Sess. Laws Act 184 § 1(a). A144.

5 *See* Act 307 § 1(b) & (f). A141 & 142-43. The legislature noted that the rising desire for fee simple ownership of houselots was but part of the "American dream," encouraged heavily by federal legislation designed "to

part because of their pervasive fear of adverse tax consequences, persistently refused to sell their land in fee simple, leasing it instead for residential use under leases typically as long as 55 years.[6] By withholding their land from the supply of land for sale in fee simple, in the face of rapidly growing demand, the landowners had precipitated a critical shortage of fee simple houselots and thus had "artificially inflated" land prices.[7] And the artificially short supply and inflated price of land had effectively forced many thousands of Hawaii residents to lease the land under their homes, depriving them of any realistic choice to live instead on land they could call their own.[8]

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enable the masses to buy that dream." Conf. Comm. Rep. No. 19, *supra* note 2, at 801.

6 *See* Act 307 § 1(e). A142. The landowners' fear of incurring massive tax liability, were they to sell their land voluntarily, was carefully documented by the legislature through extensive committee meetings with the landowners. As summarized by the conference committee, "Sales of residential lots in fee simple in great numbers [as opposed to "casual" or sporadic sales] would cause the gains derived from such sales to be taxed as ordinary income [as to a dealer in real estate in the ordinary course of business]." Conf. Comm. Rep. No. 19, *supra* note 2, at 801. To landowners who had acquired formerly feudal lands at low or zero basis, the tax liability to be feared was great indeed. It was precisely to assuage the landowners' fear of tax liability that the legislature chose *involuntary* sales through condemnation in eminent domain as the means to effectuate the purposes of the Act. *See* pp. 6-7 & n.21 *infra*.

7 *See* Act 307 § 1(g). A143. The legislature noted that because of the large landowners' hesitancy to reap massive tax liability along with profits from sales of their land, the ordinary rule that supply should increase to meet demand, bringing prices down, had simply "failed to operate" in the Hawaii land market. Conf. Comm. Rep. No. 19, *supra* note 2, at 801. Absent significant competition, and given their ability to capture oligopoly profit in their leasehold rental incomes, the landowners had no incentive to put their land on the market for fee simple sales rather than accumulate unrealized artificial appreciation in the value of their holdings. Indeed, were they all instead to enter the fee-simple market, they could have driven down the oligopoly price of land, losing their oligopoly profit forever.

8 *See* Act 307 § 1(f). A142-43. The legislature found a demonstrated, though frustrated, preference among tenants in favor of buying their houselots outright. Conf. Comm. Rep. No. 19, *supra* note 2, at 800-01.

By strangling the supply of houselots for sale in fee simple and so driving residential land prices well beyond the reach of all but a few Hawaii residents, the legislature found, the land monopoly had also contributed to general inflation in the price of consumer goods,[9] and had enabled the large landowners to exact exorbitant rents on leaseholds.[10] Thus Hawaii residents, denied the opportunity to *buy* the land under their homes at reasonable prices, were "strapped to leases which become more and more undesirable as the lease terms run."[11]

In enacting amendments to the Land Reform Act and related legislation in 1975,[12] the legislature expressly reaffirmed the findings on which the 1967 Act had been predicated, explicitly reiterated what it viewed as the highly undesirable social and economic effects of the residential leasehold sys-

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9 *Id.* at 801.

10 *Id.* at 802. Typically, leasehold rents are set at fixed rates for some fixed period at the beginning of the lease term but are renegotiated at the end of that and later periods. The renegotiated rents are generally calculated as a percentage of then current market values. Market values having meanwhile artificially inflated, renegotiated rents often take sudden, violent leaps upward. *See id. See also* 1975 Haw. Sess. Laws Act 184 § 1(d)(4) (A145) (finding rent escalation by as much as 1000%). In general, the legislature found, the landlords' disproportionate bargaining power enabled them to weight lease provisions "heavily in [their own] favor." Conf. Comm. Rep. No. 19, *supra* note 2, at 802. And in the legislature's view, the landowners' "awesome monopolistic advantage should be no less checked [by land reform legislation] than those in industry checked by our federal and state anti-trust laws." *Id.* at 801.

11 *Id.*

12 1975 Haw. Sess. Laws Acts 184 (findings reprinted at A144-46) and 186 (findings reprinted at A152-57) amended the Land Reform Act. (Hereinafter, "Act 184" and "Act 186"). The purpose of these amendments was to facilitate enforcement of the Act—which, from 1967 until then, had not been actively enforced by the State's executive branch—by "mak[ing] more equitable and convenient . . . conversion of residential leasehold lands to fee simple ownership." Conf. Comm. Rep. No. 24 on S.B. No. 1200 (Act 185), 1975 Hawaii Senate Journal 863, 863. 1975 Haw. Sess. Laws Act 185 (findings reprinted at A147-51) set limits on the amount landlords could charge for leasehold rent upon renegotiation.

tem,[13] and noted additionally that the leasehold system threatened to bring about mounting social disruption and public expense.[14]

In short, the legislature passed the Land Reform Act in order to realize four basic purposes by loosening the grip of the leasehold system: *first*, to increase the availability, alienability, and turnover of land for single-family residential acquisition[15];

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13 *See* Act 184 § 1(c) & (d) (A144-45); Act 186 § 2(a)(1)-(6) (A152-54); Act 185 § 1 (A147-51).

14 The leasehold system had so escalated the cost of living in Hawaii, the legislature found, as to threaten the ability of many Hawaii residents to maintain a decent standard of living. Act 186 § 2(a)(6), (7) & (9). A153-55. It thus threatened to cause the state additional public expense to feed and clothe as well as house those residents who could no longer afford to do so themselves. In particular, the legislature found, the elderly residents who had held onto a leasehold for its full term were likely to be, "by reason of age, income, and lack of value remaining in the leasehold, left without means to purchase other housing," and so forced to drop into the already swelling ranks of those needing to be publicly housed. *See* Act 185 § 1 (A150); *see also* Act 184 § 1(e) (A146).

Furthermore, the legislature expressed its fear that the strictures of the leasehold system could cause lawlessness "irreparably rend[ing] the social fabric." Act 186 § 2(a)(7). A154. This was no idle fear. In 1976 and 1977, for example, dissatisfied tenants in Waiahole-Waikane on Oahu who did not qualify for fee purchase under the Act staged a rent strike against the single landowner, blocked highways, burned eviction notices, and refused to leave. *See* "Tenants Won't Budge—Next Move Is Up To . . .?" Honolulu Advertiser, January 4, 1977, at A1, Col. 2, *and* "The 'War' of Waiahole," *id.* at A3, col. 2. The threat of violence was averted only when the State, exercising its general eminent domain powers, condemned the area:

> The Hawaii Housing Authority yesterday paid $6 million in exchange for the deed to 600 acres in Waiahole Valley. Payment of the state housing fund to Elizabeth Marks means that the state is now officially the owner of the Windward Oahu valley where a year ago tenants were carrying on a bitter eviction fight. Earlier this year, Gov. George Ariyoshi announced that the state would buy the land. The decision averted possible confrontation between the tenants and the police over evictions.

"State Now Owns Waiahole Valley," Honolulu Advertiser, December 1, 1977, at A13, col. 1.

15 *See* Act 307 § 1(a) & (j) (A141 & 143); Act 184 § 1(e) (1)-(2) (A146); Act 186 § 2(a)(4), (5), (8), (10), & (12) (A153-56).

second, to spread ownership of fee simple residential lots to as many people as possible[16]; *third*, to disperse the oligopolistic market power of the few large landowners[17]; and *fourth*, to stabilize the State's economy by containing the cost of living as well as the cost of public assistance to the casualties of the leasehold system.[18] These purposes could not be achieved were the land market left to private control by monopolists, the legislature found.[19] And the legislature concluded, as it had to on the record before it, that these were *public* purposes, putting land to *public* use.[20]

B. How The Hawaii Land Reform Act Works.

The mechanism the legislature chose for achieving its purposes was condemnation by the State, under the eminent domain power, of the fee simple title to houselots held under long-term leases, with payment of just compensation by the State for that title. In most cases, the Act envisioned, the State would resell that title to the tenants living on those houselots. Use of the State's condemnation power, rather than its other powers of taxation or regulation, was specifically preferred by the large landowners. Indeed, the legislature had originally drafted the 1967 Act to provide for mandatory options-to-purchase in long-term leases; it redrafted the Act in explicit response to legislative committee hearings—attended by repre-

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16 *See* Act 307 § 1(j) (A143); Act 186 § 2(a)(10), (12) & (13) (A156).

17 *See* Act 307 § 1(c) & (j) (A141-43); Act 184 § 1(d)(5)-(6) (A145), § 1(e)(3)-(4) (A146); Act 185 § 1 (A147-51); Act 186 § 2(a)(1) & (8) (A152-54).

18 *See* Act 184 § 1(e) (A146); Act 185 § 1 (A147-51); Act 186 § 2(a)(6)-(9), (11) (A153-56).

19 For example, the legislature, in discussing the imbalance of bargaining power between the owners of the former royal lands and their tenants, stated: "Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed [through legislation]." Act 185 § 1. A149.

20 *See* Act 307 § 1(j) (A143); Act 186 § 2(a)(10), (12), & (13) (A156).

sentatives of the large landowners, including the Bishop Estate, as well as officials of the Internal Revenue Service—at which it emerged that condemnation would "give maximum [tax] protection to the landowners."[21]

Condemnation under the Act works as follows. Any tenant living on a single-family residential land lot of no more than two acres,[22] within a development tract at least five acres in size,[23] may file an application with the HHA to purchase a fee simple interest in the lot.[24] To be eligible, an applicant must, among other things, own a house on the lot, show proof of ability to pay the HHA for a fee interest in the lot, and not own residential land elsewhere nearby.[25] If eligible applications are filed by the tenants of at least 25 lots or half the lots in the tract (whichever is less), the HHA holds a public hearing, upon public notice, to determine whether acquisition by the state, through condemnation or purchase under threat of condemnation, of fee simple interests in lots in all or part of the tract will "effectuate the public purposes" of the Act.[26]

If the HHA finds that those public purposes would be served, it designates some or all of the lots in the tract for

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21 *See* Special Comm. Rep. No. 2 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 785, 788-89. Expressly to prevent "the tax status of the landowners [from being] affected adversely," the Senate thus redrafted Bill No. 1128 in the form ultimately enacted as Act 307, providing for condemnation alone. *See* Stand. Comm. Rep. No. 483 on S.B. No. 1128, 1967 Hawaii Senate Journal 1063, 1065. The Act specifies that a conveyance under the Act "shall constitute a compulsory or involuntary conversion," so that the landowner making the conveyance cannot be deemed "to hold the property primarily for sale to customers in the ordinary course of trade or business." Haw. Rev. Stat. § 516-27. A121.

22 Haw. Rev. Stat. § 516-1(11). A112. Chapter 516 is reprinted at A109-40.

23 *Id.* § 516-1(2). A111.

24 *Id.* § 516-22. A118-19.

25 *Id.* § 516-33(3), (4), & (7). A124-25.

26 *Id.* § 516-22. A118-19. The Act's original requirement that the HHA also determine whether there was a shortage of fee simple lots in the surrounding county (unless certain other conditions were present), Act 307 § 11, was deleted in 1976, 1976 Haw. Sess. Laws Act 242 § 2.

acquisition.[27] The HHA then acquires the fee interests in the designated lots, either at the conclusion of condemnation proceedings brought under the Eminent Domain Law,[28] or by settling with the landowner directly.[29] By either method, the HHA acquires on behalf of the state the former fee owners' full "right, title, and interest" in the lots.[30]

Having acquired title, the HHA may sell its interest in a lot within 60 days to a tenant if the tenant has applied, qualified and executed a contract with the HHA to purchase that lot.[31] The HHA may lend such an applicant up to 90% of the purchase price at a reasonable rate of interest,[32] subject to certain restrictions—including that the HHA have the right to repurchase the lot if the borrower decides to resell it within ten years.[33]

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27 The Act was amended in 1975 to permit designation not just of an entire tract but also of portions of a tract. 1975 Haw. Sess. Laws Act 184 § 2(6). *See* Haw. Rev. Stat. § 516-22. A118-19. Nothing in the Act, however, limits designation or condemnation to only those lots on which the petitioning tenants reside.

28 Haw. Rev. Stat. ch. 101. Relevant portions of chapter 101 are reprinted at A158-78. Eminent domain proceedings are brought in the Hawaii circuit courts. *Id.* § 101-10. A163. If the condemnee's answer to the complaint denies that a taking will be for a public use, that issue may be immediately tried to the judge, and an interlocutory appeal from the judge's ruling taken directly to the Hawaii Supreme Court. *Id.* § 101-34. A175. Compensation is determined at a valuation trial with a right to a jury. *Id.* §§ 101-11 (A163); 101-23 (A167-68).

29 In either case, compensation must equal the fair market value of the owner's leased fee interest. *Id.* §§ 516-1(14) (A113-14); 516-24 (A119). The adequacy of compensation is not at issue in this case.

30 *Id.* § 516-25. A120-21. Title passes only after payment. *See id.* § 101-26. A169. The HHA is authorized to finance acquisitions with funds raised by issuance of general obligation bonds or by amounts advanced from general State funds. *Id.* § 516-45. A131.

31 *Id.* § 516-30. A122-23.

32 *Id.* § 516-34. A125-26.

33 *Id.* § 516-35. A126-28.

If the HHA does not sell the fee simple interest in a lot it acquires to a tenant residing there, it may itself lease the lot[34] or sell it to anyone on public notice,[35] subject to a general prohibition against operating for profit,[36] and subject to all other rights provided to tenants by the Act.[37] In any case, the HHA may not sell in fee simple to any one purchaser, or lease to any one tenant, any more than one lot.[38]

C. Contemporaneous State Proceedings Under The Act.

The machinery of the Land Reform Act had been set in motion by the State against various tracts owned by the Bishop Estate long before the Estate filed the federal complaint herein on February 28, 1979, and has continued to operate against those tracts and many others at all times since. Two examples in particular illustrate this continuum.[39]

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34 *Id.* §§ 516-28 ("Where necessary or desirable, the [HHA] may lease the residential lots") (A122); 516-31 ("The [HHA] may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as it may determine") (A123).

35 *Id.* §§ 516-28; 516-29. A122.

36 *Id.* § 516-32. A123-24.

37 *Id.* §§ 516-61 to 516-70 (Rights of Lessees). A132-36.

38 *Id.* § 516-28. A122.

39 Numerous other condemnation actions proceeded throughout this federal action. By November 1979, when the district court heard the first motions for summary judgment in the present case, the HHA had held public hearings on the designation of nearly 7000 of the Estate's lots, and had initiated three condemnation actions against Bishop Estate Wai-Kahala tracts (including Tracts "C" and "H") that were subsequently settled. By April 3, 1980, when the district court heard the remaining motions for summary judgment, the HHA had held public hearings concerning 1500 additional lots of the Estate, and had filed another condemnation action in state court, which was settled after the district court's final judgment of June 10, 1980. Eighteen more condemnation actions had been filed in state court against Bishop Estate lots by the time the appeal below was argued in the Ninth Circuit. As of this filing, there are pending in state court 24 condemnation actions involving over 3500 lots, although all have been enjoined by the post-judgment action of the Ninth Circuit, *see* pp. 13-14 *infra*.

First, the taking of the Bishop Estate's Wai-Kahala Tract "H" had already been found by the HHA to effectuate the public purposes of the Act, and that tract had been designated for acquisition by the HHA on October 20, 1978. That designation followed a public hearing held on April 22, 1977—a full 22 months before the Estate went to federal court. Having chosen not to press its constitutional objections to the Act either in those proceedings before the HHA, in any challenge to the adverse designation itself, or in an action brought before the Hawaii Circuit Court by the affected lessee association to compel arbitration of values for the Tract "H" lots,[40] the Bishop Estate filed its complaint in federal court[41] on the eve of arbitration finally ordered by the HHA under then-existing provisions of the Act.

Second, the Kamiloiki Valley tract, which ultimately became the test vehicle for an extensive state court trial of public use and purpose, had already been the subject of a public hearing before the HHA on February 22, 1979, nearly a week before this federal action was filed. A week before that hearing, the Bishop Estate had submitted to the HHA a written opposition, dated February 13, 1979, in which it charged that Chapter 516 violated the constitutions of Hawaii and of the United States because, among other things, it authorized takings for no public use or purpose. The Estate argued that the HHA should therefore refuse even to designate Kamiloiki Valley or other tracts. The HHA entertained this argument but ultimately rejected it, finding that the acquisition of Kamiloiki Valley would serve the Act's public purposes, and designating it for condemnation on October 17, 1980. Condemnation proceedings, filed in state court November 10, 1980, then moved to the valuation phase, in which the jury rendered a just compensation verdict on November 3, 1982.

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40 *See Wai-Kahala Tract "H" v. Midkiff*, Civ. No. 55837 (Haw. 1st Cir. Nov. 29, 1978), subsequently settled.

41 The Bishop Estate had previously attempted in state court to challenge the constitutionality of Chapter 519—the rent-renegotiation law related to Chapter 516 and based on identical legislative findings. But there, that law was found to serve constitutional public purposes. *Midkiff v. Amemiya*, *supra* note 4. *See* Portlock A232-44 (conclusions of law).

Meanwhile, the first two appeals by major landowning estates challenging takings of their land for lack of public use or purpose had reached the Supreme Court of Hawaii in actions brought under the Act. On November 10, 1982, that court reversed the trial court's partial summary judgments in the State's favor; declined to reach the federal or state constitutional issues it deemed "of first impression," and "of vast public import," without having before it an extensive record concerning "what the legislature had before it when it enacted what is now Chapter 516"; and remanded for further findings on public use and purpose.[42]

The Kamiloiki Valley proceeding was determined to be the appropriate case for that public use trial. After extensive hearings at which voluminous evidence was presented, the state trial court determined that condemnation of Kamiloiki Valley would serve a public use and purpose and that the Act, both on its face and as applied, was fully constitutional.[43] That decision is immediately appealable to the Hawaii Supreme Court. Were it not for the injunction against this and all the numerous other state proceedings under the Act, issued preliminarily by the Ninth Circuit on August 11, 1983, *see* pp. 13-14 *infra*, the Kamiloiki Valley case, begun before this federal action was filed, would therefore doubtless have been the subject of constitutional review in Hawaii's highest court before this federal action is concluded.

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42 *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (1982) (per curiam). *See also Hawaii Housing Authority v. Brown*, No. 8489 (Haw. Nov. 10, 1982). Both decisions are reprinted at Portlock A163-69.

43 *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408 (Haw. 1st Cir. Sept. 6, 1983) (Grieg, J.) (Conclusions of Law Nos. 12-14, 17, 19-23, 26). Judge Grieg's findings of fact, which number over 90 pages, thoroughly review the legislative history of the Land Reform Act, the information on which the legislature based the findings supporting the Act, the leasehold policies of the Bishop Estate, and the course of condemnation proceedings in Kamiloiki Valley. Judge Grieg concluded that under *any* civil evidentiary standard, the Bishop Estate had failed to show that the Act served no public use or purpose. *Id.* (Conclusions of Law Nos. 19-23).

D. The Federal Proceedings Below.

The Bishop Estate filed a complaint against the state defendants in the United States District Court for the District of Hawaii on February 28, 1979. The Estate alleged that the Hawaii Land Reform Act was unconstitutional on its face, among other things because it deprived "the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." JA52.

The state defendants' answer, like the answers (*see* JA76, 80) of lessee associations given leave by the court to intervene (*see* JA67), not only denied that allegation but also objected to any federal judicial intervention before the state's courts had had a chance to provide "authoritative interpretations" of the Act that "may preclude the necessity for a decision of the constitutional issues raised by the Complaint" (JA64).

On the Estate's motion, the district court granted a temporary restraining order suspending proceedings against the Estate under the Act on February 28, 1979. JA58-60. After a hearing on April 24-27, 1979, the district court refused to grant a preliminary injunction against designation or condemnation proceedings.[44] On December 9, 1979, the district court granted partial summary judgment to the defendants and intervenors-defendants, holding the Act constitutional under the public use requirement of the Fifth and Fourteenth Amendments. The district court found the goals of the Act well within the bounds of the State's police power,[45] and the means the legislature chose to serve those goals in no way arbitrary, capricious, or selected in bad faith.[46]

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44 *Midkiff v. Tom*, 471 F. Supp. at 886. A103-04. *See* JA92. The district court did, however, preliminarily—and later permanently—enjoin the use of the mandatory compensation formulas and arbitration-of-compensation procedures then provided for by the Act. *See* JA91-92. Defendants and intervenors-defendants did not appeal this ruling, and the formulas and arbitration provisions have since been repealed by the legislature. 1980 Haw. Sess. Laws Act 107.

45 483 F. Supp. at 67-70. A70-75.

46 483 F. Supp. at 69, 70. A73-74, 75. Final judgment was entered by the district court on June 10, 1980. JA106-08.

On appeal from the district court's judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, in an opinion announced nearly three years after appeal was taken. Relying principally on selected statements by Madison and Hamilton and on the natural law theories of such seventeenth- and eighteenth-century writers as Grotius and de Vattel rather than on any twentieth-century judicial precedent, 702 F.2d at 790-93 (A5-10), the court's opinion, by Judge Alarcon, curtly dismissed years of painstaking legislative investigation and the voluminous findings to which such study led, *see* pp. 1-6 *supra*, as mere "rationalizations" for "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit," 702 F.2d at 798 (A21). Such "appease[ment] [of] the desires of a landless majority to own residential land," *id.* at 793 (A10), the court announced, was "majoritarian tyranny," *id.* at 790 (A5), which inherently violated "the private property rights of the landed minority," *id.* at 798 (A21), and thus transgressed on its face "the public use limitation of the fifth and fourteenth amendments," *id.* (A21).

Joining the court's opinion, Judge Poole also wrote separately to explain why he thought it "manifestly" correct. *Id.* at 799. A21-22. While doubting the Act's efficacy and necessity, *id.* at 804-07 (A32-38), he agreed that its fatal flaw lay simply in its facial operation to "prefer[ ] B's ownership of the land to A's," *id.* at 807 (A38). Whatever social gain might be wrought by effectuating such a preference, he reasoned, only a "Huxleyan advent" so sweeping as to overturn "Magna Carta" could validate even a compensated " 'redistribution' of the property of others." *Id.* A37.

Neither member of the majority thought abstention called for. *Id.* at 789-90 n.1 (A2-4); 799-803 (A22-31). Judge Ferguson, dissenting, concluded "that instead of reaching the merits . . . the majority should have abstained in favor of ongoing state judicial processes," and stated that, in any event, Hawaii's "land reform program . . . does not result in an unlawful taking of property." *Id.* at 819. A63.

Notwithstanding the filing of timely appeals to this Court—by the State on July 15, 1983 (JA166), and by the intervenors shortly thereafter (JA180-81)—the Ninth Circuit, on the

Bishop Estate's motion, recalled its mandate on August 11, 1983, and enjoined all ongoing and future state proceedings against the Estate under the Act, pending issuance of a new mandate. Four months later—after exhaustive briefing, oral argument, two applications by the State to the Circuit Justice for relief from the injunction, and the Justice's suggestion that the Ninth Circuit's post-judgment imposition of an injunction in this case posed "serious" and indeed "close and rather intricate" questions under both the traditional requirements of equity and the principles of comity and federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny[47]—no new mandate has issued.

SUMMARY OF ARGUMENT

Wholly ignoring the elaborate findings of Hawaii's legislature explaining why land reform was a public necessity, the court below announced a wooden and inflexible rule: a state's use of its taking power to transfer land from one group of owners to another is per se invalid as a taking for a private purpose. This is not, and could not be, the law. For this Court—having long ago forbidden federal courts from sitting as superlegislatures to second-guess the wisdom of state socio-economic measures—has repeatedly upheld as rational state laws that, through coercive regulation, enhance the value of the property of one group at the specific expense of another. *See* I.B *infra*. Indeed this Court has long held that such laws *must* be upheld so long as their fulfillment of legitimate public purposes is even "debatable." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

Had Hawaii chosen to deploy the police or taxing powers rather than the taking power to dismantle its residential leasehold system for the sake of ends that are manifestly public and significant, *see* I.A *infra*, there can thus be no serious question that a federal court would have been bound to uphold that exercise of power under a test of minimum rationality. Nor could the fact that such regulation in effect transferred prop-

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47 *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 7, 9 (1983) (Rehnquist, J., in chambers).

erty rights or values between private groups have triggered heightened scrutiny.

No closer scrutiny can properly be applied by a federal court to a state legislative determination that a *taking* will serve a public purpose. "For the power of eminent domain is merely [a] *means*" to an otherwise legitimate public end, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis added), and the principle that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . admits of no exception merely because the power of eminent domain is involved," *id.* at 32.

If anything, state taking legislation coupled with just compensation merits even *less* scrutiny for public purpose than does redistributive state action under the police power or the taxing power. For because the state must back up any determination of public necessity for a *taking* with a promise of full and fair *compensation* for the property taken, taking legislation does not even redistribute aggregate wealth. Accordingly, this Court has held throughout this century that, when a legislature has found that a taking will serve public ends, "[i]ts decision is entitled to deference unless it is shown to involve *an impossibility*." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (emphasis added). *See* I.C *infra*.

The Ninth Circuit's application of the strictest scrutiny when all relevant precedent called for the most minimal, and its attempt—in a throwback to an era long since past—to substitute *its* view of the public good for the Hawaii legislature's view, must therefore be reversed. Affirming the ruling below would make this the very first twentieth-century federal judicial invalidation of a state legislature's finding that fully compensated takings in eminent domain will serve a public purpose.

Affirming the judgment below, moreover, would authorize federal judicial intrusion in circumstances where pending state-initiated proceedings against the federal plaintiffs not only afford the latter an ample opportunity to vindicate their federal claims, but also afford state tribunals an opportunity to dispose of or recast the entire case on state grounds, making adjudication of the federal issues presented premature, overbroad, and potentially gratuitous. *See* II *infra*.

ARGUMENT

I. THE NINTH CIRCUIT'S INVALIDATION OF HAWAII'S LAND REFORM ACT USURPED STATE LEGISLATIVE POWER IN A MANNER UNPRECEDENTED IN THIS CENTURY.

A. The Hawaii Land Reform Act Is Classic Socioeconomic Legislation, Designed To Serve Purposes Recognized As Vitally Public From The Very Founding Of Our Republic.

The State of Hawaii's effort in the Land Reform Act to liberate the royal lands of Hawaii's former monarchs for ultimate purchase by the tenantry upon those lands, far from inaugurating the "Huxleyan" Brave New World denounced in the concurring opinion below, 702 F.2d at 807 (A37), simply extends to our fiftieth State the New World of our Constitution's Framers. For the Act not only serves purposes entirely typical and unquestionably public by modern legislative standards, but has roots no less ancient than thirteenth-century England, and fulfills a vision of the free democratic state fundamental to early America's transition from its colonial past.

1. Freeing The Alienability Of Land Over Time.

The Hawaii Land Reform Act was designed to free the alienability and turnover, by those who live on it, of land that would otherwise revert perpetually to a small handful of owners. It thus aims to do nothing more novel than vindicate the age-old Anglo-American common law principle against restraints on alienation—a principle now reflected in the law and public policy of all fifty states. Parliament vindicated that same principle when, in 1290 under the reign of Edward I, it enacted *Quia Emptores*.[48] That statute lifted restrictions barring tenants from granting their land without consent from or payment to their overlord[49]—restrictions that had provoked

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48 18 Edw. I, st. I, cc. 1-3.

49 The restriction on alienation by long-term leaseholders is, if anything, more absolute, for the leaseholder cannot grant his landlot in fee *at all*.

tenants widely to create their own sub-tenancies instead. *Quia Emptores* declared it lawful for tenants to alienate their land freely, so long as their grantees held not from them but directly from the overlord.

The American Revolution, which ultimately freed our forebears from holding land or any other right under any overlord except themselves as a sovereign people, largely put an end to the feudal incidents with which large proprietors had encumbered the land in many of the American colonies.[50] And in

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50 It was quite common in the original colonies for officials of the crown to grant land in vast tracts to proprietors who in turn permitted settler tenants to live on the land—either under explicit long-term leases, or under grants that amounted to long-term leases because the proprietor reserved to himself, quite against the spirit of *Quia Emptores*, perpetual obligations of payment from his tenants in the form of "quit rents." *See* Vance, *The Quest for Tenure in the United States*, 33 Yale L. J. 248, 256-57 (1924). Such feudal restrictions on the freehold were exacted by the Penns in Pennsylvania, the Fairfaxes in Virginia, the Granvilles in North Carolina, the Baltimores in Maryland, and the VanRenssalaers and Livingstons and other "patroons" in New York, to name but a few. These perpetual encumbrances on their landlots were widely loathed by the colonists. *See id.* at 257-58 ("great resentment and public indignation [at quit rents and the levying of distress for their nonpayment] served as one of the principal inducing causes of that state of the public mind that made possible the [American] Revolution"); *see also* B. Bond, *The Quit-Rent System in the American Colonies* 456-60 (1919)("as a token of overlordship and a source of income for absentee proprietaries, the quit-rent was altogether out of keeping with the increasing spirit of individual freedom," *id.* at 459-60).

The Revolution of 1776 led to the widespread abolition of quit rents and other aristocratic vestiges—whether *de facto*, or by statute. Virgina's assembly, for example, summarily abolished quit rents in 1779, declaring "the reservation of royal mines of quitrents and all other reservations" in the grants of formerly royal lands to be "null and void," *see* Act of May 1779, 10 *Hening's Statutes At Large* 64, ch. 13, § 6 (1822); and Connecticut spoke for many states when it declared land to be held "in absolute and direct dominion" by its tenant rather than subject to reservations by any superior lord, *see* Act of 1793, Conn. Rev. Stat., tit. 56, ch. 1, § 1 (1821). Many of the new state constitutions—including those of Massachusetts, New York, New Hampshire, Pennsylvania, and Vermont, like Hawaii's in this century, *see* Haw. Const. Art. I, § 2—enshrined "the right to acquire" property, not just to hold it, as one of the most basic freedoms.

those states in which such feudal incidents persisted, popular legislation hastened their demise by the next century.[51]

The eradication of the restraints on alienation perpetuated by lingering aristocratic landowning patterns, and the various kinds of legislation used to achieve it, were never doubted in America's earliest states to have a fully public purpose[52];

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51 Pennsylvania's experience illustrates both the longevity of a quasi-feudal system of perpetually renewable long-term land leases, and the resourcefulness of a state legislature in seeking to lift that system's restraints—first by taxation, second by divestiture, and third by facilitating adverse possession. In the 1760's, the Pennsylvania colonial assembly attempted to force the Penns to sell off some of the vast tracts they had administered feudally by levying a land tax at a progressive rate. *See* VI B. Franklin, *Papers* 133-34, 162, 196-97, 523-29 (1959 ed.). In 1799, the legislature employed a more direct means: deeming them contrary to the "safety, liberty and happiness" of the people of the state, the Pennsylvania legislature divested the Penn family of all feudal rights, such as to quit rents, furnishing 130,000 pounds compensation. *See* Divesting Act of 1799, 1776-1781 Pa. Acts 258, ch. 139 (1782). As late as 1855, the legislature found it necessary to further enable tenants to throw off their leases, and to acquire freely alienable title to the land they lived on, by declaring all ground rents unpaid and undemanded for 21 years to be extinguished.

In Maryland, where the leasehold system was similarly tenacious, the legislature utilized yet a fourth type of legislation—the regulation of lease terms—to enable tenants to acquire freely alienable title. In 1888, it enacted a statute requiring that any long-term lease give the tenant the right to purchase the fee. (Exactly such a law might have been enacted in Hawaii had the major landowners not preferred condemnation. *See* pp. 8-9 & n.21 *supra*.)

In New York, a vast system of perpetual leases requiring perpetual rent payments to large landowners had survived so vigorously into the nineteeth century that by 1848, the governor estimated that one-tenth of the state's population still lived on manorial leasehold estates. *See* Sutherland, *The Tenantry on the New York Manors*, 41 Corn. L.Q. 620, 624-25 (1956). In the 1840's, escalating violence by tenants who rebelled against paying their manor lords, in "feudal servitude interminable," hens and bushels worth of quit rents, helped to stimulate passage of legislation to tax the landowners' reversionary interests as well as to limit lease lengths and landlords' remedies, in order to discourage the continuation of leaseholds. *See id.* at 631-33.

52 For example, this Court upheld the 1855 Pennsylvania law as a legitimate exercise of the police power for "the general convenience," *Wilson v. Iseminger*, 185 U.S. 55, 60-61 (1902). The Maryland Supreme Court found the Maryland option-to-purchase law a sound exercise of public policy based on "a well-grounded belief that these long leases, with their

Hawaii's more recent effort to eradicate the lingering restraints of a later-lasting feudalism serves no less public a purpose.[53]

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convenants of renewal, were injurious to the prosperity of the City of Baltimore," *Stewart v. Gorter*, 16 A. 644, 645 (Md. 1889). And although the New York anti-leasehold laws were never judicially interpreted to be legitimately public in purpose, Governor Seward refuted any suggestion to the contrary when he wrote, in his 1840 message to the legislature, that leasehold tenures, "introduced before the Revolution, are regarded as inconsistent with existing institutions, and have become odious to those who hold under them. They are unfavorable to agricultural improvement, inconsistent with the prosperity of the districts where they exist, and opposed to sound policy and the genius of our institutions." III Lincoln, *Messages from the Governors* 776 (1840), *quoted in* Sutherland, *supra* note 51, at 630.

53 Nor can any argument be made that public purpose is extinguished when restrictions on alienability are reduced by reallocating the bundle of property rights in a parcel of land, as Hawaii's law might be said to do despite its provision for just compensation. For the police power has long been viewed as fully embracing the power to redefine property rights *without* compensation where the legislature finds a particular public necessity. As this Court stated in *Wilson v. Iseminger*, a state may promote the general convenience not only through such obvious devices as safety laws, but also through laws that redefine property rights: " 'estates held in joint tenancy and in common may [under a state's "police power"] be divided among the tenants, even by conversion and sale; life estates may be separated from each other; qualified inheritances expanded into absolute fee; and contingent and executory interests extinguished.' " 185 U.S. at 61. This Court has likewise upheld adverse possession laws despite its acknowledgement that they "indirectly . . . effect a complete divestiture and tranfer of right." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Peters) 456, 467 (1831). And as Samuel Tilden stated in his 1846 report on "The Anti-Rent Disorders" in New York, alterations in the laws governing the descent of property so as to remedy "the principal evil" of "[a]n excessive suspension of the power to alienate lands, which restrained any one man from having their complete control, and prevented the full development of their resources," had never been viewed as beyond the power of the legislature—notwithstanding the fact that such legal alterations "unsettled the disposition of a vast . . . amount of property." I S. Tilden, *Writings and Speeches* 215 (1885).

In any case, sheer reallocation of the bundle of property rights to particular lands in order to redress some public injury has a venerable history: the great Statute of Uses, enacted by Parliament in 1536 under Henry VIII, curbed two mischiefs of the "use" system—the non-registry of title to land, and the evasion of feudal incidents owed to the King and other lords, by those who conveyed uses to their lands—by simply conferring full legal ownership of land on those who had held mere uses in that land.

2. Broadening Opportunities For Land Ownership.

The Hawaii Land Reform Act was designed not only to enable any particular land parcel to be more freely transferred *vertically* from landowner to landowner over time—rather than be trapped perpetually in the hands of a single landowner—but was designed also to spread land ownership *horizontally* by enabling more Hawaii residents to acquire the land on which they live. It thus aims to do nothing more novel than fulfill the promise America held out long ago to its settlers—the promise that the many need not go landless in order that a few might rule the land. As John Adams wrote,

> The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates.

IX J. Adams, *Works* 376-77 (1856 ed.).[54] Indeed, the maximum dispersion of opportunities to own one's own land and home has since been the aspiration of much American policy.

To give but a few examples, the Homestead Act of 1862[55] reflected a strong federal policy in favor of broadly disaggregated land ownership and against absentee aggregation of landholdings for speculative purposes. The Act required that an applicant intend to use the land for "settlement and cultivation," and rigidly limited the amount of land a single applicant could receive[56]—a limit maintained until the homestead law's repeal in 1976.

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54 In a nation that at its outset permitted only freeholders to hold office and to vote, such a view is not surprising. Freeholding, furthermore, was widely viewed in the early days of the republic as as powerful incentive to economic productivity; as Samuel Tilden observed in decrying leasehold tenure, "[t]he mere idea of proprietorship is a valuable element of the . . . social character. . . . [T]he inclination to make improvements is impaired if the sense of ownership is not complete." Tilden, *supra* note 53, at 196-97.

55 12 Stat. ch. 75, 392 (1862).

56 *Id.* §§ 2 & 6.

Likewise, a complex of more modern federal programs reflects a strong federal policy in favor of broadly dispersed access to home ownership. The widest possible distribution of the American dream is the ultimate goal behind, for instance, mortgage financing through the Federal Home Loan Bank System and the Federal National Mortgage Association, mortgage insurance subsidized by the Federal Housing Administration, favorable tax treatment for home ownership under the Internal Revenue Code, and construction of various forms of public housing. No such federal program has been successfully challenged as insufficiently public in purpose; nor can our fiftieth state's effort to extend the American dream to its people be so condemned.

3. Breaking Up Oligopolistic Control.

As the flip side of multiplying opportunities for land ownership, the Act is designed to disperse the extraordinarily concentrated market power of a small oligopoly of landowners in Hawaii, and to increase the bargaining power of tenants in relation to those landowners. It thus aims to do nothing more novel than combat one of the very phenomena the Founders most feared and hoped most to prevent from arising in the New World as in the Old: namely, land monopoly. The fear that excessive concentration of land ownership would strangle the supply of land, and so drive up its price, characterized even some pre-Revolutionary thought.[57] And the need to forestall

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57 This fear was expressed, for example, by Joseph Morgan, a Bostonian Congregational minister, in a 1722 pamphlet entitled *The Original Rights of Mankind*. In keeping with prevalent Puritan thought, Morgan decried landholdings in excess of "need and use," and advocated a tax on dormant land to force land speculators to disgorge their holdings.

Other colonists stressed less the immoral than the uneconomic effect of land monopoly. New York's surveyor-general and lieutenant-governor Cadwallader Colden, for example, complained that in the face of the artificial shortage of land caused by land monopoly in New York, "every year the Young people go from this Province and Purchase Land in the Neighbouring Colonies, while much better and every way more convenient Lands lie useless. . . ." Report of Cadwallader Colden 1 *Documentary History of the State of New York* 377, 384 (1849).

While New York colonists might readily have avoided a life of tenantry by traveling but a few miles to Connecticut or Vermont, choosing such an

land monopoly in the United States was viewed as pivotal to the new republic by framers like Jefferson.[58]

In the modern era, breaking up concentrated economic power so as to enhance competition, efficiency, and the functioning of the market is the central public mission of the antitrust laws. States, like the federal government, are clearly empowered to order monopolists or oligopolists to divest their property. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 & n.13 (1978).

Not since such decisions as *Coppage v. Kansas*, 236 U.S. 1 (1915), which suggested that inequalities of bargaining power are "but the normal and inevitable result" of liberty of contract, *id.* at 17-18—decisions thoroughly repudiated by this Court for the last half-century[59]—has it been doubted that regulation tending to offset the unequal bargaining power of employer and employee, or of landlord and tenant, *see, e.g. Block v. Hirsh*, 256 U.S. 135 (1921), is well within ordinary legislative authority. Nor is that authority in any way diminished merely because such regulation may disappoint the ex-

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alternative is far more costly to Hawaii residents. For Hawaii residents to journey to any other state, they must cross 2500 miles of water. *Cf. Olim v. Wakinekona*, 103 S. Ct. 1741, 1746 (1983) (upholding federal prisoner transfer).

58 Having observed, as Ambassador to France, the crisis of a landless peasantry deprived of work on large landowners' vast estates—estates he viewed as in excess of natural justice—Jefferson believed it critical to prevent the rise of any such land monopolies in the United States of America. In some of his writings, he advocated a geometrically progressive tax on landholdings as a preventive measure. *See* I T. Jefferson, *Papers* 358-63, 484, 560; II *id.* 139-40 (1950 ed.); *see generally* W. Scott, *In Pursuit of Happiness* 42-43 (1977). In opening up the western lands, some members of the early Congress believed it crucial to avoid land aggregation by speculators in favor of disaggregated ownership and use by settlers. *See, e.g.* 3 E. Channing, *A History of the United States* 535-38 (1920).

59 It is not clear that the court below took any notice of the demise of *Coppage*, however, for the majority opinion—in a passage reminiscent of that case and devoid of any modern authority—cites Madison's statement, " 'In all civilized societies, distinctions [of property] are various and *unavoidable*,' " as authority for its invalidation of Hawaii's law. *See* 702 F.2d at 791 (emphasis added). A7.

pectations built up by the disproportionate market power previously enjoyed by the landlord; many indisputably public rent-control, condominium-conversion, and mandatory option-to-purchase ordinances do just that.

4. Facilitating Public Tranquility And Welfare.

In addition to reforming the residential land market, the Act is designed to serve a variety of other purposes important to the general public welfare of the state—to the "moral, social, economic, and physical well-being of the community," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952), as well as to its "spiritual" and "aesthetic" values, *Berman v. Parker*, 348 U.S. at 33. It is designed—like much fiscal and monetary policy—to stabilize the cost of living by curbing land prices and rents. It is designed to prevent families from having to watch as their lifelong homes are razed by the bulldozers of landlords with more profitable uses of the land in mind. It is designed to avoid social disruption and disobedience to law inspired by the harsh strictures of a residential leasehold system—in Hawaii, *see* note 14 *supra*, no less than in New York over a century ago, *see* note 51 *supra*. It is designed to reduce social expenditures needed by casualties of the residential leasehold system, such as the elderly who, no longer able to afford to lease, must enter public housing. And it is designed to give Hawaii residents the opportunity to acquire and enjoy full equity in their homes and homesites, to pass on to their children[60] or to sell as they please—an opportunity that might well keep some from abandoning the state in desperation, or inspire others to build more enduring residences, secure in the knowledge that the land on which they have made their homes cannot be pulled out from under them at the end of decades-long leases.[61]

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60 New York's lieutenant-governor Colden noted that quit rents were intolerable to Americans because they had left the Old World precisely "to avoid the dependence on landlords [suffered by "Vassals and Tenants"], and to enjoy lands in fee to descend to their posterity that their children may reap the benefit of their Labour and Industry." Colden Report, *supra* note 57, at 384.

61 The universal human wish to avoid such harsh uprooting was perhaps best described by Justice Holmes, who wrote in a letter to Henry

"The concept of the public welfare is broad and inclusive," *Berman v. Parker*, 348 U.S. at 33; each of these purposes of the Hawaii Land Reform Act falls well within its bounds. And the *combination* of these purposes yields not merely a rational, but a compelling, justification for the Act.

B. Neither The Economic Benefit Conferred On One Group, Nor The Economic Harm Inflicted On Another, Can Invalidate Regulations A Legislature Could Rationally Have Believed Would Advance Such Public Purposes.

1. The Governing Standard Is One of Minimum Rationality.

The court below not only wholly ignored the manifold purposes underlying the Hawaii Land Reform Act, but also wholly ignored the federal constitutional standard by which all state socioeconomic legislation is to be judged. Those challenging socioeconomic legislation—whether on substantive due process or on equal protection grounds—must show "that the legislative facts on which [a law] is apparently based could not reasonably be conceived to be true by the [legislature]." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). So long as "the question is at least debatable," *United States v. Carolene Products Co.*, 304 U.S. at 154, those who attack economic legislation as not reasonably calculated to advance legitimate state goals "cannot prevail," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 470 n.12 (1981).[62] Disregarding this standard, the

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James that he favored the acquisition of title by prescription because "man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life." Letter from O.W. Holmes to Henry James, Apr. 1, 1907, *reprinted in* M. Lerner, *The Mind And Faith Of Justice Holmes* 417 (1943).

62 *Accord, United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-78 & n.10 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 124-25; *New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam); *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. at 425 (Court's "recent cases . . . leave debatable issues as respects business, economic, and social affairs to legislative decision"). Furthermore, contrary to the implications of the concurring opinion below, *see* 702 F.2d at 804-806

court stated only its view that public transfers of property from one set of private parties to another are p[illegible]se invalid as serving a private purpose, notwithstanding payment of full compensation, and no matter how broad the economic and social benefit they bring about. *See* 702 F.2d at 798 (A21); *id.* at 806(A36). But that is not the law, as the following analysis makes clear.

2. Regulatory Redistributions Of Economic Advantage Trigger No Heightened Scrutiny of Socioeconomic Legislation.

Even uncompensated redistribution of economic advantage through regulation is not invalidated, nor even subjected to higher than minimal scrutiny, merely because it imposes economic costs on, or denies economic opportunities to, "A" in order that "B" may gain. Indeed, virtually all of the very cases that reiterate the minimum rationality standard involved state regulations that destroyed or impaired one set of investment-backed property interests in order to protect or enhance another that the legislature deemed it in the public interest to prefer.

In *Miller v. Schoene*, 276 U.S. 272 (1928), the economic benefit conferred on apple owners at the direct expense of cedar owners did not invalidate a state regulation requiring the uncompensated destruction of infected cedar trees in order to save nearby apple trees. Instead, Justice Stone wrote for a unanimous Court that

> [i]t will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of

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(Poole, J.) (A32-36), it is clear that "whether *in fact* the provision will accomplish its objectives is not the question: the [Fourteenth Amendment] is satisfied if . . . the . . . [state] legislature rationally *could* have believed that . . . [it] would. . . ." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466; *Vance v. Bradley*, 440 U.S. at 112. Since the ability of the Hawaii Legislature rationally to believe that the Land Reform Act would achieve its public purposes is beyond question, no factual evidence the Act's challengers might have adduced would have sufficed to overturn the Act.

> apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.

Id. at 279.

Regulation has similarly been upheld on a minimum-rationality standard against Fifth and Fourteenth Amendment challenge notwithstanding the fact that it conferred a distinct economic advantage on, for example, truck owners advertising only their own wares at the expense of those seeking to advertise the wares of others,[63] on eye doctors at the expense of opticians,[64] on lawyers at the expense of debt adjusters,[65] on established pushcart food vendors at the expense of "vendors of more recent vintage,"[66] on retail car franchisees at the expense of automobile manufacturers seeking to open competing franchises,[67] on railroad workers connected with the in-

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63 *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a city ordinance forbidding advertising on trucks except by the truck owner of his own goods or services, on the ground that local authorities may well have concluded that the latter posed less risk of distraction to traffic).

64 *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (upholding a state statute forbidding an optician from fitting or duplicating lenses without a prescription from an opthamologist or optometrist, on the ground that the legislature might have concluded that a prescription was necessary often enough to require one in every case).

65 *See Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (upholding a state statute forbidding debt adjusting except by those authorized to practice law, on the ground that the legislature could have concluded that the business of debt adjusting lacked social utility).

66 *See New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (per curiam) (upholding a city ordinance banning from the historic Vieuex Carre all vendors except two who had operated there for over eight years, on the ground that the city could reasonably decide that the two exempted vendors had greater reliance interests or had themselves become part of the charm of the district).

67 *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding a state statute permitting existing franchisees

dustry as of 1974 at the expense of those with similar experience lacking so recent a connection,[68] and on the paperboard industry at the expense of the plastic container industry.[69] In short, this Court has long since decisively rejected the losing argument made before it by the cedar owners in *Miller v. Schoene*:

> We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another.

276 U.S. at 275 (argument of counsel).

That argument has unequivocally been rejected, in fact, in the precise context of laws eliminating certain property rights of landlords in order to expand the rights of their tenants. Such laws recognize that "what in its immediate aspect may be only a private transaction may . . . be raised by its class or character to a public affair," *Block v. Hirsh*, 256 U.S. 135, 155 (1921). Holding that, where land is "monopolized in comparatively few hands," *id.* at 156, government may by law transfer control to tenants over the reversionary interests that landlords

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to trigger administrative review of prospective manufacturer dealerships, on the ground that the legislature was "empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices," *id.* at 107, or to redress "disparity in economic power" between the two, *id.* at 111 (Marshall, J., concurring)).

68 *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177-78 (1980) (upholding an Act of Congress eliminating dual retirement benefits for workers without a 1974-or-later connection with the industry, on the ground that Congress could have concluded that such funds ought to be used first for those more recently working as railroaders).

69 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (upholding state ban on the sale of milk in nonrefillable plastic but not in nonrefillable paperboard containers, on the ground that the legislature could rationally have concluded that such a ban might have environmentally desirable effects).

had retained through pre-existing leases, the Court in *Block v. Hirsh* not only gave "great respect" to the legislature's "declaration . . . concerning public conditions that by necessity and duty it must know," *id.* at 154, but even permitted the "property rights" at issue to "be cut down, and to that extent taken, without pay," *id.* at 155.

Although dispute persists over the circumstances in which government may effect such an *uncompensated* "transfer of control over the [landlord's] reversionary interest," *Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S. Ct. 218, 220 (1983) (Rehnquist, J., dissenting from dismissal of appeal for want of substantial federal question); *cf. id.* at 218 (majority evidently extended *Block v. Hirsh* beyond temporary emergency measures), the Court now seems unanimous in upholding the underlying substantive power to transfer the property rights at issue. No echo can be heard in this Court's contemporary cases of the cry of Justice McKenna, joined by Chief Justice White and Justices Van Devanter and McReynolds in dissenting from *Block v. Hirsh*, that such transfers reek of "socialism," 256 U.S. at 162, and manifest "tyranny and injustice," *id.* at 163, insofar as they "annul the covenants of a contract between two . . . citizens . . . to transfer . . . the property of one and vest [it] in the other," *id.* at 164.

It follows that, had Hawaii's legislature chosen to attack the residential leasehold system by means of simple regulation—for example by imposing, as it considered doing and as Maryland did long ago, a mandatory option-to-purchase requirement on all long-term leases—the proposition that the landowners lost economic advantage in order that the tenants might gain would not invalidate the law, particularly given the built-in compensation that would occur when each option was exercised. If the landowners might thus have lost one "political battle," they could have been expected to win others in the ordinary give-and-take of the "legislative forum," *see United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).[70] As Justice White wrote for the Court in *Vance v.*

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70 Indeed, the very fact that Bishop Estate lobbied, for federal tax reasons, against the Maryland law in favor of the condemnation law that was ultimately enacted, *see* notes 6 & 21 *supra*, demonstrates that its voice was heard —and heeded—in the state's legislative process.

Bradley, "The Constitution presumes that, absent some reason to infer antipathy, ... decisions [if "improvident"] will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 440 U.S. at 97. To apply strict scrutiny to such a regulation would be to treat as a discrete and insular minority a class distinguished only by its wealth in Hawaii landholdings.[71]

3. Even Regulations That Transfer Private Property Interests In Land So Sharply As To Be Deemed "Takings" Trigger At Most A Requirement Of Just Compensation.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922), this Court held that a state ban on subsurface coal mining that threatens surface housing not owned by the coal company—as applied to parties whose predecessors in title had earlier contracted between themselves, for valuable consideration, to permit precisely such mining—in effect *took* subsurface property previously retained by the coal companies, and conferred that property upon those to whom the coal companies had previously sold only the surface rights. But all that followed from the Court's recognition of private benefit in that transfer[72] was that the state could not achieve its aims "by a shorter cut than the constitutional way of paying for the change," *id.* at 416—*not*, as the theory of the court below would require, that the state could not transfer defendants' property to the plaintiffs *at all*, even upon payment of fair compensation. In short, the fact that the challenged regulation worked a property transfer from the coal company to the surface dweller—from "A" to "B"—in no way prevented the Court from "*assum[ing]* . . . an exigency exists that would warrant the exercise of eminent domain," *id.* That *compensation* might be required in no way requires closer scrutiny of *public purpose*.

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71 The Ninth Circuit seems to have done just that. *See* 702 F.2d 798 (need to protect "the landed minority"). A21.

72 The Court in *Mahon* recognized that it was dealing with "the case of a single private house," *id.* 413, and that the law at issue could not be "justified as a protection of personal safety," *id.* 414. Nor was there a claim in that case, as there had been in *Block v. Hirsh*, of a housing shortage that might warrant an uncompensated transfer of property rights.

C. Whether A State's Overt Exercise Of The Taking Power To Transfer Property Interests Between Private Groups Serves A Public Purpose Is Likewise Reviewable By A Federal Court Only For Minimum Rationality.

1. Judicial Deference In Such Cases Is Mandated By Logic And Precedent Alike.

It would make no sense whatsoever to hold that *eminent domain*, even with just compensation, may sometimes be barred for want of public purpose where an *economic regulation* having the same overall aims and effects, and similarly operating by transferring property interests between private groups, would routinely be upheld—without searching scrutiny of public purpose, and with no more than, at most, a requirement of just compensation. For any such holding would perversely press the state into achieving by unscrutinized regulatory action, perhaps even without compensation, what federal judges could prevent the state from accomplishing by compensated exercises of eminent domain. The upshot would be *less* protection for the private interests adversely affected, and reduced flexibility for the state—a clear loss to all concerned. Happily, that is not the law.

On the contrary, the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking—either automatically, or even presumptively—as having only a private purpose. The controlling precedent is *Berman v. Parker*, 348 U.S. 26 (1954), in which the Court held that, as in the case of all socioeconomic legislation, "[t]he role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one," *id.* at 32. That decision, by a unanimous Court, upheld a taking of a department store's land for transfer to a private housing developer. Flatly rejecting the argument "that this makes the project a taking from one businessman for the benefit of another businessman," Justice Douglas wrote that, once the public purpose of the taking is established, the use of the taking power is just another means to that end, and any decision such as whether to transfer the property to a private or a public redeveloper is for the legislature alone to resolve. *Id.* at 33-34.

Long before *Berman v. Parker*, moreover, this Court had laid to rest any notion that literal "use by the general public" was a prerequisite to a finding of public purpose in a taking of private property, and had upheld numerous takings whose immediate beneficiaries were one or more private individuals—individuals who sometimes initiated the takings and furnished the requisite compensation.[73] In all such cases, the Court has recognized that "the very foundations of public welfare" may demand "concessions from individuals to each other" that cannot always "be left wholly to voluntary consent." *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 531 (1906).[74]

The standard of review evolved in these cases, and in cases involving the federal taking power, its one of "well-nigh conclusive" deference, *Berman*, 348 U.S. at 32, to any legislative determination that a taking will serve a public purpose, so long as that determination is not so manifestly irrational as to involve "an impossibility," *Old Dominion Co. v. United States*,

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73 Thus, in *Rindge Co. v. Los Angeles*, 262 U.S. 700, 706-07 (1923), the Court held that the taking of ranch property for a road usable by various neighbors for "marketing produce" and other similar business or recreational private activities was sufficiently "public" in purpose, even though neither the "entire community, nor even any considerable portion, [would] directly enjoy or participate in [the] improvement." And in *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 530-31 (1906), the Court upheld the taking of a right of way, in a condemnation proceeding begun by a private company pursuant to state law, for an aerial tramway across private property in order to facilitate the company's commercial exploitation of mineral resources, upon payment into court by the company of the fair value of the right of way thereby condemned. Similarly, in *Clark v. Nash*, 198 U.S. 361 (1905), the Court upheld the condemnation by an individual of an easement across another's land for the irrigation of the individual's property, pursuant to a state law permitting such condemnation. *See also Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896) (condemnation by irrigation districts); *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 22 (1885) (upholding state Mill Act authorizing riparian owners to erect and maintain mills provided they compensate upstream landowners for resulting flooding).

74 *See also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 323 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946); *Government of Guam v. Moylan*, 407 F.2d 567, 568 (9th Cir. 1969). *See generally* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

269 U.S. at 66; *see United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946).[75]

2. Such Deference Is Required Whether Or Not The Divestiture Of Property Effects Concrete Changes In Use Or Possession.

The court below, utterly disregarding this established standard, stated that, except for certain "historically accepted" situations supposedly fixed for all time by stare decisis, *see* 702 F.2d at 794, 795-96 (A12, A14-16),[76] such deference need apply only when takings effect concrete changes in the use or possession of the land taken, *id.* at 794-95 (A13-14).

This mechanical view, however, has no basis whatever in the case law, and indeed blindly ignores the fact that, in some circumstances, it is only compensated reallocation of ownership in land that can effect the public benefit sought. Divestiture of an oligopolist's property, for example, need change neither use nor possession; it is by breaking up concentrated *ownership* that such antitrust measures achieve their competition-enhancing aims. The Statute of Uses similarly changed neither use nor possession, but merely rearranged the bundle of legal rights to each parcel of land it affected. *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946), likewise upheld a land redistribution program that, among other measures, created homestead rights in those squatting on the land. *See id.* at 319, 325. And in perhaps the most analogous setting of all, the

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75 These two decisions reviewed takings authorized by Congress. It is clear, however, that at least as much deference must be paid to state legislatures, in light of the well-settled principle that "a local legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity" and the general welfare. *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d at 324. This means that factual disputes in this sphere are solely for the legislature to resolve, with *no* second-guessing at all by a federal court so long as the matters at issue are at least debatable, as they certainly are here.

76 It is ironic how quickly the court below, having stressed the importance of judicial oversight of public use, abdicated that self-proclaimed responsibility by reducing the eminent domain precedents to a rigid set of categories immune to historical evolution.

Maryland Supreme Court rejected the argument that lessees' options to purchase their leased land—options that, if exercised, change ownership, not use or possession—per se confer only private benefit: "it was the *system* of these long leases, irredeemable until the end of the term, that the legislature wished to break up, *rather than any special consideration for the lessees*, that caused the [Maryland] act," *Stewart v. Gorter*, 16 A. at 645 (emphasis added).

3. In Any Event, Hawaii's Land Reform Act Works No Mere Private Transfer That Leaves Land Use Unchanged.

Only the most short-sighted could view the Hawaii Land Reform Act as merely shifting title from "A" to "B" without changing the use of land in Hawaii. Even the court below, after all, did not deny that the Act shifts land out of *investment* use for the speculative purposes of a few absentee owners of large development tracts into *residential* use for the personal purposes of many occupants of small lots. *See* 702 F.2d at 796-97 (A17). The Act safeguards against speculation and encourages residential use: it authorizes no condemnation on behalf of occupants who own residential land elsewhere nearby, *see* p. 7 & n.25 *supra*; the HHA may not sell to any one purchaser, or lease to any one lessee, any more than one condemned lot, *see* p. 9 & n.38 *supra*; the HHA may repurchase any lot if one to whom it has lent the purchase price decides to resell it within ten years, *see* p. 8 & n.33 *supra*; and the HHA may retain title to the lots it condemns, leasing instead of selling individual homesites, *see* p. 9 & n.34 *supra*.

Moreover, viewed from a long-term perspective and in macrocosm, the shift in use occasioned by the Act will likely make an enormous difference to Hawaii's overall pattern of land development. Land distributed in small parcels among many owners is unlikely, for example, to be pooled for large investment projects such as a single large landowner might wish to construct.[77]

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77 The Bishop Estate has itself been withholding from sale to current leaseholders certain beachfront properties for which "it apparently wants to keep open such future options as resort development." The Honolulu Advertiser, July 20, 1983, at A-3, col. 2.

4. The Hawaii Land Reform Act Has None Of The Special Features That Might Make Even A Fairly Compensated Taking Constitutionally Suspect.

There is no federal precedent for subjecting any particular *category* of takings, regardless of just compensation and public purpose, to special judicial scrutiny (including a demand for a compelling state interest and a search for less drastic means) of the sort this Court has applied in certain "civil liberties" cases since the 1960's.[78] To be sure, all private property is a specifically protected constitutional right. But the unique protection it receives under the Constitution is that it cannot be taken without just compensation—a requirement inapplicable when personal liberty is cut back, and in that sense "taken," by a socioeconomic measure.

If this Court should ever decide that the Constitution's promise of just compensation insufficiently protects some particular category of property, or some particular subset of property takings for a public purpose, such a decision could surely occur only in a context where no amount of money could "compensate" for the special harm government was doing—where government was expropriating not an impersonal and fungible economic investment, but a person's home or place of worship or center of political association, so as to effect some combination of dispossession, desecration, or disenfranchisement in addition to a taking of compensable wealth.[79]

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78 *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960) (freedom of political association); *Sherbert v. Verner*, 374 U.S. 398 (1967) (free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (freedom of interstate travel); *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate pregnancy).

79 Such a case might be one in which many are uprooted from their dwellings and dispersed as a cohesive political community at the behest of a major corporation or other politically powerful combination. *See, e.g., Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation of an ethnic residential neighborhood to make way for a General Motors plant that would allegedly provide more jobs for the state's people). *See id.* at 474 (Ryan, J., dissenting) (advocating closer scrutiny because this taking forced people from their "lifelong home and community"); *id.* 468-70 (Ryan, J., dissenting) (advocating closer scrutiny in light of single corporate beneficiary identifiable in advance); *id.* at 463-64

It would be worse than ironic for the eminent domain power—so widely used in the last century to permit private corporations to force small landowners from their homes for the sake of economic development, typically with little or no actual compensation, and with few meaningful procedural checks, *see, e.g.*, Scheiber, *Property Law, Expropriation, And Resource Allocation By Government: the United States, 1789-1910*, 33 J. Econ. Hist. 232, 237-43 (1973)—to be held unconstitutional in this century where used to protect people from forcible exile from their homes, a use more consistent with the aspirations of our Constitution's Framers. Far from *dispossessing* anyone, the Act enhances the domestic security of the families and children who live on the land by giving them an opportunity to own it, while fully preserving, through just compensation, the interest of those for whose benefit the land is currently held as an investment. And the Act, far from *aggregating* political power in the hands of a favored and identifiable few by stripping the many of the property in which their political identity and influence are rooted, democratizes whatever political clout the ownership of land in Hawaii confers.

* * *

It follows that the Ninth Circuit's facial invalidation of the Land Reform Act was as unwarranted as it was unprecedented—an unjustifiable blow both to the legitimate land-use aspirations of Hawaii's people, aspirations the state legislature aptly described as the "American dream," and to the sovereign lawmaking authority of their elected legislative representatives.

(Fitzgerald, J., dissenting) (same). *See also*, R. Caro, *The Power Broker* 850-94 (1974) (taking of land for Cross-Bronx Expressway obliterated thousands of homes in an Eastern European Jewish community, rather than take the land of their politically more powerful neighbors).

II. IF APPELLEES' CONSTITUTIONAL CHALLENGE IS AT ALL COLORABLE, THEN THE COURTS BELOW VIOLATED PRINCIPLES OF FEDERALISM AND COMITY IN FAILING TO ABSTAIN OR DISMISS.

This Court has long recognized that proper regard for the respective roles of federal and state tribunals in resolving constitutional attacks on state laws warrants strict adherence to principles of abstention, *see, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), including federal dismissal to permit already pending state proceedings to continue without needless interruption, *see, e.g., Younger v. Harris*, 401 U.S. 37 (1971). The costs of overbroad, premature, or altogether avoidable federal interference with the enforcement of state laws are potentially enormous. At stake are both this Court's legitimacy as final arbiter of the Constitution's meaning and the viability of state sovereignty in the federal system. The values served by abstention or dismissal are especially important where, as in this case, the constitutional challenge is one directed against the state's exercise of its eminent domain power—a power "intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959), and where, as here, federal intervention threatens to disrupt ongoing state proceedings in which questions of "first impression," *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (Haw. 1982) (Portlock A166), concerning the basic scope and validity of that state law are being determined. The failure of the courts below to abstain or dismiss breaches these fundamental principles.

At the outset, we note two possible reasons for nonetheless overlooking that breach in this case. *First*, if the preceding argument, *see* I *supra*, persuades the Court that appellees' constitutional claims against Hawaii's Land Reform Act are "utterly without substance," then perhaps the district court's prompt exercise of jurisdiction, under the circumstances of this case, best advanced the fair and efficient administration of justice without usurping any state function. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 34 (Brennan, J., dissenting). Were this Court to agree with that

assessment of the merits, it might follow that the district court acted defensibly in summarily rejecting appellees' claims on the merits, pausing neither to dismiss nor even to abstain.[80]

Second, whether or not the district court erred in reaching the merits, requiring abstention or dismissal at this late stage simply may not be worth the costs of continued litigation and uncertainty over the law's facial validity—if the Court is prepared to sustain the law on the present record as the State urges. To be sure, the value of correcting the lower courts' abstention errors—both for this case and for the guidance of other courts in the future—is considerable. But the disadvantages of such a course are manifest as well, particularly now that the State of Hawaii has been acting under a cloud of doubt for nearly five years of federal litigation. To prolong that period would consume still further public and private resources, only to reach a conclusion this Court might well be prepared to decree without such costly delay: validation of the Land Reform Act on its face so far as federal law is concerned. Indeed, to the extent protracting this litigation restricts the pace and possibility of enforcing the Land Reform Act, it will enable appellees, seeking to extract their oligopoly price before it is too late, to subvert the purposes of the Act by selling their land to wealthy third parties before the land can be designated or condemned. If costs such as these are thought to outweigh the advantages of directing abstention or dismissal at this point, and if this were the Court's stated reason for proceeding to the merits and upholding the law, this Court would nonetheless retain the benefits of instructing lower federal courts on their duty to abstain or dismiss at the outset in similar situations.[81]

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80 Of course, no such justification could be offered for the Ninth Circuit's refusal to abstain. For, far from regarding appellees' claims as frivolous, the court below deemed them sufficiently meritorious to warrant facial invalidation of the Act.

81 On the other hand, if the Court found appellees' claims substantial on the present record, the State would, of course, accept the costs of further delay for the opportunity to have its own courts put the Act in the best posture for an ultimate ruling sustaining its state *and* federal constitutionality.

A. ***Pullman* Abstention.**

Pullman's requirement of abstention is avoidable only by a clear showing that "no alternative to [federal] adjudication is open." 312 U.S. at 498. A state court alternative *is* open, however, whenever a definitive ruling on state law grounds might either present the federal claim in a different posture or permit its avoidance. *See Harris County Commissioners v. Moore*, 420 U.S. 77, 84 (1975). The policy of abstention has its most vital application precisely when a federal court believes it might be necessary to declare a complex state statutory scheme invalid on its face—particularly when that scheme undertakes social and economic reforms through the eminent domain power. In such a case, the potential for "needless friction with state policies is at its greatest." *Pullman*, 312 U.S. at 500. Where, as here, the constitutional claim is directed against the *face* of a state statutory scheme on grounds that, when viewed as an undifferentiated whole, it serves no legitimate public purpose but merely seeks to "appease the desires" of certain private persons, 702 F.2d at 793 (A10), a state law ruling narrowing, modifying, supplementing or substituting this challenged private purpose could dramatically recast the constitutional claim, moot it, or do both—by transforming the statewide facial question into a series of localized as-applied issues much like those presented, and held to require abstention, in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[82]

Abstention policies would have been well served in this case had the court below awaited the views of the Hawaii Supreme Court concerning the precise purposes of the Hawaii Land Reform Act in its many possible applications. Instead, the court below—disregarding the broad power of state courts to provide saving constructions of constitutionally vulnerable

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82 The court below erred not only in misapplying *Pullman* abstention doctrine, but also in misconstruing that doctrine to compel abstention only when the constitutional question " 'plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.' " 702 F.2d at 789 n.1 (A3). Such a reading of *Pullman* incorrectly constricts its scope by omitting state law rulings which might remold state laws so as to present the constitutional question in a materially different posture.

state laws[83]—preemptively (and indeed incorrectly, *see* I.A *supra*) construed the Act to have only the singular and narrow purpose of enabling a certain group of Hawaii residents to purchase the land on which they now reside, so as to confer private benefit on those residents. Having thus shriveled the aims of the Act, the Ninth Circuit felt entitled to denounce it as nothing more than "the instrument by which private property held by a minority . . . is to be redistributed to appease the desires of a landless majority to own residential land." 702 F.2d at 793 (A10).

Given the variety of purposes for condemnations under the Act elaborately set forth in the Act itself, the Ninth Circuit's refusal to abstain cannot be defended on the ground that the Act's *language* dictates the monolithic view of its purposes adopted below. And, had the advice of the Hawaii Supreme Court been sought, the court below could not have simply ignored the multiple and indisputably "public" purposes of the Act, *see* I.A *supra*. For even if the Ninth Circuit could conceivably hold that these antitrust and other public objectives were insufficiently articulated in the Act or in its legislative history to be among its permissible purposes, that court surely overstepped *Pullman* bounds in effectively precluding the Hawaii Supreme Court from issuing a definitive ruling that one or more of those public purposes *must* be included as among those contemplated by the Act in any assessment of its facial validity.

In light of the starkly different posture of the constitutional claim that would result, the court below certainly erred in taking upon itself the task of declaring all such public purposes beside the point in construing the Act's true meaning and aim. When presented in a posture incorporating, for example, its antitrust purpose, the Act would satisfy even the strict test of "public use" propounded in the concurring opinion below—namely, that "the private benefit must be an incidental one,

83 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (states are "free to allocate the lawmaking function to whatever branch of state government they may choose," and thus to delegate to their own agencies or courts as much of a legislative second-guessing function in enforcing state, albeit not federal, constitutional norms as they wish); *cf. id.* at 479-81 (Stevens, J., dissenting).

and not the dominant purpose of the taking." A34. Indeed, the entire federal controversy might well have been avoided, and might even now be averted, by affording state courts a definitive opportunity further to identify the nature and priorities of the Act's various purposes. For even appellees concede that the object of reducing inflated land values and the overall cost of living is a "legitimate" public purpose. *See* Motion to Affirm in Nos. 83-141 & 83-283, at 27. Appellees contest the economic wisdom of the Act as a means of fighting inflation. *See id.* But even if appellees' unprecedented demand for such extraordinary second-quessing of the economic efficacy of the Act were acceptable, it would simply underscore the necessity of abstention. For it is inconceivable that any federal court could properly conduct so intrusive an inquiry when, in view of a federal court's lack of the "legislative" power possessed by state courts, that inquiry would at best lead to a constitutional ruling based on an incomplete record of support for the Act in question. Abstention is thus the only appropriate alternative.

In essence, abstention is required to allow the Hawaii courts to conclude the final stage of the state's legislative process—the stage in which the state's courts specify and, if necessary, modify the meaning and supporting factual foundation for enacted laws to save them not only from condemnation under the United States Constitution but also from invalidation under the state constitution—here, Section 20, Article I, of the Constitution of Hawaii. Thus, appellees' complaint that there are no restrictions on lessees' post-acquisition use of the property, or that the HHA is not required by the Act to condemn and transfer lots in numbers sufficient to have the desired anti-inflationary effect, while raising no legitimate federal issue, might be found by the state courts to raise serious questions under the state charter. To save the Act—and incidentally make it possible for federal courts to avoid the federal constitutional challenge entirely—the state courts could choose to sustain the legislation by imposing certain conditions on the Act's deployment of the eminent domain power.[84]

84 The meticulous way in which the state's courts have both required administrative hearings by the HHA into the "public use" issue and re-examined that issue in judicial trials casts doubt on any surmise that Hawaii's "public use" requirement is but a "mirror image" of the Fourteenth Amend-

Because the federal court below lacked authority to take any such step, its refusal to abstain required it precipitously to judge the Act on its face—and led it thereupon to void the Act indiscriminately and unnecessarily, as well as erroneously.

B. *Younger* Abstention.

Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must dismiss constitutional claims that have been or could be presented in ongoing state proceedings. *Younger* extends to non-criminal proceedings when important state interests are involved, *see Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982), and its policies of equitable restraint are applicable generally "when [federal courts] are asked to oversee state law enforcement authorities," *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983). It is plain

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ment's due process clause, contrary to the court's suggestion below, *see* 702 F.2d at 800 (Poole, J., concurring) (A24); *see also id.* at 789-90 n.1 (A3-4). On the contrary, both the relevant text of the state's statutory and constitutional law—*see* Hawaii Rev. Stat. § 516-83(a)(12), and Hawaii Const. Art. I, § 20—and the practice to date under both, preclude any confident prognosis that Hawaii's judges and administrators will, under state law as authoritatively construed by the Hawaii Supreme Court, treat the findings of the Hawaii Legislature as deferentially as a federal court is bound to do. The Hawaii Supreme Court not only could revise or supplement those findings, but could even conclude that no construction or supplementation of the legislative record could save Chapter 516 from facial invalidation under Article I, § 20 of the Hawaii Constitution.

Nor, in any event, are those cases suggesting that abstention is not required in order merely to give the state a first chance to strike down its legislation under a state constitutional provision identical to a federal one even apposite. Section 20 is not the type of "broad and sweeping" constitutional guarantee of general application like the equal protection provision involved in *Examining Board v. Flores de Otero*, 426 U.S. 572, 597-98 (1976). And section 20 is not redundant of the Fifth Amendment, much less the Fourteenth, which contains no reference to public use except to the extent necessary to comply with the Supremacy Clause.

Indeed, if abstention is rejected in this case, it is difficult to see when, if ever, the state courts would have an opportunity to develop the meaning of their own constitutional restrictions on eminent domain power. To treat the Fifth Amendment's felicitous requirement of "a public use" like a trademark would rob the states not only of the means of elegant expression for their constitutional norms, but also of the opportunity to give content to those norms in important cases.

that enforcement of the Hawaii Land Reform Act through eminent domain proceedings implicates vitally important state interests going to the very core of Hawaii's sovereign prerogatives. *See Hawaii Housing Authority v. Midkiff,* 104 S. Ct. 7, 9 (1983) (Rehnquist, J., in chambers, denying stay); *Ahrensfeld v. Stephens,* 528 F.2d 193 (7th Cir. 1975). The force of *Younger* policies is magnified where, as here, the ongoing state proceedings, however characterized, effectively serve *both* as the final stage of the legislative process during which the state law's basic purposes, operation, and supporting factual record are refined as needed to shield it against indiscriminate facial nullification, *and* as a forum for the ventilation and vindication of federal constitutional claims. In practical terms, the state law is not fully operational—and, in Article III terms, perhaps not even ripe for facial challenge—until this last phase of the state lawmaking process has been completed. *Cf. City of Los Angeles v. Lyons.*[85]

The court below rejected the application of *Younger* to this case on the ground that there were no state proceedings of a judicial nature which were ongoing at the time the federal suit was filed on February 28, 1979, or before any action of substance was taken by the federal court in that suit. 702 F.2d at 790 n.1 (A4). The Ninth Circuit was in error.

First, condemnation actions brought by the State under the Land Reform Act, including one against Bishop Estate lots in Wai-Kahala Tract "C," Civ. No. 59202, were in fact pending in state courts before any action of substance had occurred in the federal suit. The state's condemnation complaint in Tract "C"

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85 To treat a facial challenge to the Act as premature until the state courts have been given the opportunity to correct potential infirmities in the law implements no unique policy, but rather basic principles that counsel against both advisory opinions, *City of Los Angeles v. Lyons,* 103 S. Ct. at 1668; *O'Shea v. Littleton,* 414 U.S. 488, 495 (1974), and imputations of disrespect for state allegiance to constitutional norms. *See Middlesex County Ethics Comm.,* 457 U.S. at 431. These principles, which derive both from Article III and from conceptions of federalism, have consistently been applied to bar federal courts from enjoining enforcement of newly enacted state statutes before they have been applied. *See Babbitt v. United Farm Workers,* 442 U.S. 289, 304 (1979); *American Federation of Labor v. Watson,* 327 U.S. 582, 598-99 (1946); *Alabama Federation of Labor v. McAdory,* 325 U.S. 450, 461-62 (1945).

was filed September 21, 1979; that case was pending in state court until January 21, 1981, when it was settled.[86] The court below deemed September 1979 too late for a state filing to trigger *Younger* because the district court had already granted a temporary restraining order on February 28, 1979—the date the federal suit was filed—and had already denied in relevant part the Bishop Estate's motion for a preliminary injunction, in an order issued June 8, 1979. *See* A30 (concurring opinion). But neither the *ex parte* federal award of the temporary restraining order on the day the federal complaint was filed, nor the later denial of a preliminary injunction regarding the constitutional questions presented here, was an action of substance on the merits; nor should the fact that the federal parties engage in adversarial and evidentiary proceedings on a motion for a preliminary injunction prevent state courts from thereafter obtaining preclusive jurisdiction for *Younger* purposes. Indeed, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court implicitly held that such federal decisions, even though forecasting the outcome on the merits, are too preliminary and contingent to constitute actions of substance on the merits for *Younger* purposes.[87]

86 State condemnation suits were also filed on September 21, 1979, against the Bishop Estate with respect to two sets of lots in Wai-Kahala Tract "H" (Civ. Nos. 59191 and 59201), subsequently settled.

87 In *Hicks*, a motion nominally styled one for a temporary restraining order was filed and a month later denied before any state criminal proceeding was initiated. *See* 422 U.S. at 353 n.1 (dissenting opinion). Both parties had filed numerous affidavits and other documents in federal court on the motion. Despite the district court's determination that there was an insufficient likelihood of plaintiffs' prevailing on the merits, 422 U.S. at 338, this Court held that the subsequently filed state criminal proceedings *preceded* any federal action of substance on the merits. That preliminary assessments of the merits by federal courts do not count as actions of substance is further confirmed by this Court's ruling in *Middlesex*, finding *Younger* applicable despite the fact that the district court had dismissed the complaint on abstention grounds and that a stay of state disciplinary proceedings pending appeal had been issued. *See also Hicks*, where *Younger*'s application also was not barred by the district court's decision finding plaintiffs' claims sufficiently meritorious to warrant convening a three-judge court, 422 U.S. at 338.

Different considerations would obviously obtain if the district court, here or in *Hicks*, had granted preliminary relief and the state had proceeded to file

In any event, a condemnation action against Bishop Estate lots in Wai-Kahala Tract "H," Civ. No. 55837, was in every real sense initiated when the HHA officially designated the property for condemnation on October 20, 1978—several months *before the federal complaint was even filed.* The Bishop Estate, in its Motion to Affirm in No. 83-236, at 2, describes the 1978 "administrative proceedings" leading to this designation as "proceedings . . . that, if uninterrupted, would ultimately have led to the involuntary condemnation of Trustees' fee title in various lots." Once a designation order has issued, in other words, a judicial condemnation proceeding is ordinarily *inevitable*: that judicial proceeding is thus "pending," for all practical purposes, from the date of designation. Indeed, the nexus between designation orders and condemnations is far closer than was the nexus between the disciplinary investigation and ruling of the ethics committee and the subsequent imposition of discipline by the state supreme court in *Middlesex,* where this Court concluded that the investigatory function performed by the committee was part of the judicial disciplinary proceeding so far as *Younger* was concerned.[88]

Second, even if no *condemnation actions* had been pending in state court before actions of substance had been taken in the federal suit, the undisputed pendency of *designation proceedings* in the HHA at the time the federal suit was initially filed sufficed to trigger *Younger.* The Ninth Circuit's holding to the contrary rests on an unsupportable presumption that such proceedings are insufficiently judicial in nature. The label the state attaches to such proceedings cannot, of course, be determinative. The crucial question is whether those proceedings afford an adequate opportunity for the federal plaintiffs to raise their federal constitutional objections against enforcement of the state law involved. The Act plainly obligates the

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state court actions in violation of the injunction. *See United States v. United Mine Workers,* 330 U.S. 258 (1946).

88 Doubt concerning the nexus between the designation decision and the condemnation trial raises a question of state law which should, of course, be resolved by the Hawaii Supreme Court. That court might well conclude that, under state law, even the *initiation* of a designation proceeding by public hearing on the question whether condemnation will serve the Act's public purposes constitutes part of the condemnation process. *Cf. Middlesex.*

HHA to hear and rule upon such claims in the course of determining whether the proposed condemnation will serve the Act's public purposes. Accordingly, the Bishop Estate submitted to the HHA its constitutional objections to the taking of its Kamiloiki Valley tract in advance of the public designation hearing held by the HHA with respect to that tract on February 22, 1979—six days before this federal suit was filed. *See* p. 10 *supra*.[89] That the HHA rejected the Estate's constitutional position hardly establishes that it was structurally "incompetent . . . to adjudicate the issues," including the federal constitutional issues, "pending before it," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1977).[90]

To the extent uncertainty persists as to whether the Hawaii Supreme Court or legislature regard HHA designation proceedings as judicial in nature, and whether the HHA is structured to hear and decide constitutional claims judiciously, the only proper course is abstention while the parties seek a ruling on the matter by the state courts. For the judicial capacity of the HHA is, of couse, purely a matter of state law. *See Middlesex*, 457 U.S. at 434; *Geiger v. Jenkins*, 316 F.Supp. 370, 372 (N.D.Ga. 1970), *aff'd* 401 U.S. 985 (1971).

At the very least, therefore, for the Ninth Circuit itself to rule—without the benefit of state judicial guidance—that "the public hearings before the [HHA] bear none of the attributes of a judicial proceeding," 702 F.2d at 802 n.5 (Poole, J., concurring) (A29); *id.* at 790 n.1 (opinion of Alarcon, J.) (A4), only compounded the violation of *Pullman* and *Thibodaux* and constituted an independent violation of *Burford v. Sun Oil Co.*, 319 U.S. 315, 325-32 (1943), in which this Court counseled against federal judicial guesswork about such peculiarly complex and specialized local matters as the relation of a

89 Such a public designation hearing was held with respect to certain Bishop Estate lots in Tract "H," Civ. No. 55837, as early as April 22, 1977.

90 Of course, if a designation decision is deemed the culmination of a *judicial* proceeding for *Younger* purposes, then failure to challenge a designation on appeal in the state judicial system in itself requires dismissal of this federal suit under *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Inasmuch as appellees failed to appeal the HHA's designation decision regarding Tract "H" entered October 20, 1978, *Huffman* should have led the district court to dismiss the federal complaint under *Younger* on that ground alone.

state's judicial to its administrative processes in allocating scarce natural resources. This simply was not a case, therefore, in which it could be said by a *federal* court that "the predicate for a *Younger v. Harris* dismissal was lacking." *Gibson*, 411 U.S. at 577.

CONCLUSION

The Ninth Circuit's invalidation of vital state legislation thus represented an impermissible assault on all three branches of state government. Had the federal challenge to the Land Reform Act been as serious as the circuit court deemed it, the only course consistent with our federal system would have been abstention or dismissal. Instead, having erroneously bypassed the state executive and judicial branches, the court below shattered all twentieth-century precedent by substituting its notions of Hawaii's land-use needs for those of the state legislature. No branch of any state's government may rest secure while so roving a commission is at large. To correct such federal judicial excess, this Court should reverse the judgment below.

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Nos. 83-141, 83-236, and 83-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
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On Appeal from the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the courts below did not correctly assume jurisdiction over the constitutional questions presented where:

(a) under the *Pullman* doctrine (i) no party had raised this doctrine in the Court of Appeals; and (ii) the state eminent domain statute at issue clearly stated that any exercise of the state's eminent domain authority "is for a public use and purpose," thus leaving no room for ambiguity or a different state court interpretation; and

(b) under the *Younger* doctrine (i) the state never claimed at any time throughout the proceedings in both lower courts that *Younger* was applicable and, to the contrary, affirmatively sought a federal judicial decision on the merits; (ii) private parties cannot assert *Younger* abstention; and (iii) there were no pending state court proceedings either at the time this suit was brought or at the time the federal District Court issued a temporary restraining order and later a partial preliminary injunction against the enforcement of the challenged state law.*

2. Whether a state statute providing for a taking by eminent domain of the fee simple title of lessors' lots for the immediate transfer of the title to lessees violates the "public use" requirement of the Fifth and Fourteenth Amendments to the Constitution of the United States, where that taking (a) can be performed only at the behest of the individual lessees already owning homes situate upon the lots; (b) applies only to the specific lots for which the lessees have applied and for which the lessees themselves pay the amount awarded upon condemnation;

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* In our Motions to Affirm, appellees identified two additional subsections—one concerning the *Burford*, and the other concerning the *Colorado River*, abstention doctrines. Because appellants have not contended in their briefs on the merits that either doctrine is applicable, appellees have omitted these subsections.

(c) does not change the use, usability, possession, or occupancy of the lots taken, or their environs, but instead simply transfers title to the applicant lessees; (d) involves the state only as the conduit for the transfer of title; and (e) does not establish any restriction of any kind upon the lessees' right to impose restraints upon the further alienation of those lots once the lessees have obtained titled.

3. Whether the state statute described in Question 2 violates the Due Process Clause of the Fourteenth Amendment by impermissibily delegating to private parties the right to exercise the sovereign power of eminent domain.

4. Whether the state statute described in Question 2 violates the Due Process Clause of the Fourteenth Amendment by failing to have as a sustaining legislative purpose anything other than a bare desire to harm a politically unpopular group of landowners within the state.

5. Whether the state statute described in Question 2 violates the Contract Clause of Article I, § 10, of the Constitution as applied to leases executed prior to its initial enactment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-141

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-236

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-283

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLEES

Appellees Frank E. Midkiff, *et al.*[1], Trustees of the Kamehameha Schools/Bishop Estate ("Trustees"), re-

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[1] Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. As counsel for Trustees informed the Court by letter dated December 23, 1983, Mr. Midkiff is recently deceased and no successor has yet been appointed. William S. Richardson has succeeded Mr. Ching.

spectfully urge affirmance of the judgment of the Court of Appeals, which held facially unconstitutional Part II of Hawaii Revised Statutes Chapter 516.[2]

STATEMENT

I. THE NATURE OF THE CASE.

One of the fundamental rights protected by our Constitution is the right to secure enjoyment of private property. Throughout our history, this right has been subject only to the state's regulatory authority and, in narrowly defined situations, the state's ultimate sovereign power to take property for a *bona fide* "public use." The statute in issue abrogates this right.

The briefs of appellants[3] underscore the novelty of the statute and the radical constitutional doctrine which is necessary to sustain it. If the statute is upheld, it will provide an easy model by which any legislature, responding to the pressures of some of the electorate and to the occasion violent swings of political processes, can nullify the explicit textual constitutional protection afforded every person against the state's exercise of its eminent domain power for private uses.

Chapter 516 authorizes the immediate transfer of title to Trustees' property to the lessees under circumstances in which the transfers (a) can be performed only at the behest of the individual lessees who will receive the property; (b) will be compensated by the lessees themselves, rather than the government or the public at large; (c) apply only to the specific lots for which lessees have applied, and upon which the lessees already own houses; (d) shift private property from one private party to another; (e) do not change the use, usability, possession,

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[2] Hereinafter "Chapter 516." Citations are to the 1976 replacement volume, as amended through the 1980 session of the Hawaii State Legislature, unless otherwise noted. The statute as so amended is reproduced in full in the Hawaii Housing Authority JS App. A109-140.

[3] Herein referred to as "HHA Br." and "Portlock Br."

or occupancy of the lots taken under the Act or their environs; (f) involve the state simply as the conduit for the transfer of title without any accompanying, or even contemplated, system of continuing regulation, oversight, or control of the transferred properties or their environs; and (g) do not require or contemplate, as a prerequisite to condemnation, that the lessees adhere to a predetermind comprehensive land-use plan or agree to any restrictions of any kind upon their subsequent alienation of those lots once the lessees have obtained title thereto. Surely if condemnations of this type do not constitute a purely private transfer of property, no condemnations can ever be so labeled. As we shall also show, the statute violates the Fourteenth Amendment Due Process Clause and the Contract Clause of the Constitution.

II. TRUSTEES AND THE AFFECTED LEASEHOLDS.

A. Trustees and the Schools.

Trustees administer the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first monarch of Hawaii.[4] The nucleus of her Will was a perpetual charitable trust for the establishment and support of the Kamehameha Schools.[5] The Schools provide a wide array of educational services for children of Hawaiian ancestry in kindergarten through high school.[6] In addition, the Schools reach

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[4] Pursuant to direction of the Will, successor trustees are appointed by the Justices of the Supreme Court of Hawaii.

[5] The Kamehameha School for Boys opened in 1887, and the School for Girls opened seven years later. Today, the combined Schools enroll 2,850 students full-time and 9,000 part-time, or approximately one-quarter of all school aged youth of Hawaiian ancestry. 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Matsunaga).

[6] JA 46-47. In 1853, 95.8% of the Islands' population was Hawaiian, whereas by 1980 only 1% of the population was Hawaiian and 17.9% part-Hawaiian. Department of Geography, University of Hawaii, *Atlas of Hawaii* 112 (2d ed. 1983). Concern about the decimation of the Hawaiian people motivated Princess Bernice to endow the Schools. *Id.* at 103.

a broad segment of the Hawaiian community through their Extension Education Division.[7]

Upon her death in 1884, the Princess' estate consisted of lands (virtually all inherited from other members of the Royal Family [8]) which then comprised about 11% of the lands in the Islands. As a result of exchanges, sales, and condemnations over the years, the trust lands now comprise about 8% of the land area in Hawaii, but much of this land is inaccessible or otherwise unusable, *e.g.*, in lava fields and watershed areas. These unusable lands, together with those zoned and used for agriculture, comprise over 97% of the Trustees' land holdings. Less than 3% of the trust lands is devoted to residential, resort, and commercial use, and the income generated from these parcels provides nearly the sole support for the Schools.[9]

Trustees' land presently serves an indisputable public use.[10] In stark contrast, Chapter 516 empowers private

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[7] Approximately 24,000 additional individuals annually receive educational benefits from the Schools through workshops, demonstrations, lectures, and other short-term educational contacts. 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Matsunaga).

[8] As the amicus brief of the Hou Hawaiians describes, land formed the basis of the Hawaiian culture. Private land ownership was unknown; the chiefs and the king held and administered the land for the benefit of all the people. The destruction of this so-called "feudal" system of landholding coincided with the virtual destruction of the native Hawaiians. Lopez-Reyes, *The Demise of the Hawaiian Kingdom*, 13 Haw. B.J. 3, 6, 11-13 (1983). Through her wisdom and foresight, Princess Bernice preserved intact the last major Hawaiian landholding, with its use devoted, as dictated by custom, to her people's benefit.

[9] Tuition and fees provides less than 15% of the Schools' annual budget (JA 46-47).

[10] The Schools recently were acclaimed, by the Chairman of the U.S. Senate Education Subcommittee, "as a prime example of what our nation's private elementary and secondary schools have the potential for becoming; that is, a true living laboratory combining practical experience with ongoing quality [educational] research endeavors." 129 Cong. Rec. S17,205 (daily ed. Dec. 14, 1983) (statement of Sen. Stafford).

lessees, at their election, to compel appropriation of Trustees' land for purely personal purposes. Ironically, at a time in American history when the rights and special needs of the aboriginal [11] population are finally receiving recognition,[12] this statute strikes at the jugular of a unique non-profit trust dedicated to providing quality education for an underprivileged native group.[13]

B. The Leasehold System in Hawaii.

Leasing of residential lots in Hawaii did occur prior to World War II, but there were relatively few leaseholds as compared to lots owned in fee simple. The number of leasehold lots substantially increased after World War II due to heavy demand for single family residences and the minimum capital available to the families requiring new housing.[14] The practice of leasing, rather than selling,

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[11] Hawaiians, along with American Indians, Aleuts, and Eskimos, are the only groups defined as natives under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1981), a dramatic recognition on a nationwide level that these are people whose traditions, culture and religion are deserving of special protection and preservation.

[12] Congress has found that "like other Native Americans, Native Hawaiians rank among the lowest in level of educational attainment and per capita income." Pub. L. 96-374, 94 Stat. 1499 (1980) (codified at 20 U.S.C. § 1221-1). As part of its goal of promotion of economic and social self-sufficiency of the Hawaiians, Congress established the Native Hawaiian Study Commission to investigate the unique "culture, needs and concerns of the Native Hawaiians." Pub. L. 96-565, 94 Stat. 3324-3327 (1980) (codified at 42 U.S.C. § 2991a).

[13] In 1963, when the Hawaii Legislature considered a bill to allow the conversion of residential leases to fee simple ownership, Hawaiian clergymen denounced the legislation from their pulpits, held emotional prayer sessions, and led a torchlight parade and vigil outside the capitol while the legislators debated the merits of the bill. *See Honolulu Advertiser*, April 4, 1963, at 1, and April 12, 1963, at 1; *Honolulu Star-Bulletin*, April 24, 1963, at 1, and April 30, 1963, at 33. The bill failed to pass.

[14] Indeed, it is ironic that the Bishop Estate's decision in this period to assist the state in alleviating the housing shortage by leasing Estate land should now be punished by a threatened loss of that property.

residential lots in newly-developed subdivisions arose mainly from three factors. Most persons (primarly veterans and other young people) were unable to pay for fee simple title to *both* the lots *and* the residences upon the lots. Most new lots were developed on land owned by landholders [15] who had held the land for decades, had an extremely low "basis," and would have had to pay ordinary income tax on nearly 100% of fee simple sale proceeds as "dealers." [16] And restrictions in trust instruments of some landholders inhibited sales.[17] Nonetheless, there is an abundance of fee simple land in Hawaii.[18]

Since the 1950's, most of Trustees' leases have been on FHA and VA approved forms to permit lessees to finance purchase of their homes through mortgages with FHA or VA guarantees. A typical lease [19] has a 55-year term, with annual rental fixed for the first 25 to 40 years

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[15] Most, but by no means all, were relatively large landowners. Many subdivisions of fewer than 50 lots were developed and leased by owners of small tracts. These subdivisions, too, are impacted by the statute (JA 51).

[16] Trustees, who are in this group, also had to be concerned with protecting the status of the trust as a tax exempt organization.

[17] For instance, the Princess' Will directs the Trustees "to keep and manage" rather than sell trust lands except when funds are needed for construction at the Schools, or when the Schools' best interests would thereby be served.

[18] On the Island of Oahu, as of January 1, 1982, there were 72,839 owner-occupied units (single *and* multi-family) where the land was owned in fee simple, as compared with 35,539 leasehold units. *The State of Hawaii Data Book* table 486, at 497 (1982). Cumulative statistics covering single-family units alone have not been published. Figures are available for recent sales and show that fee simple sales have heavily predominated over leasehold sales of newly developed units. In 1981, for example, on Oahu, 69% of newly-built single-family units were on land sold with the residence in fee, and 31% were on land leased to the purchaser of the residence. *Construction in Hawaii* (Bank of Hawaii 1982). Virtually all of the residential leaseholds affected by Chapter 516 are located on the Island of Oahu.

[19] Typical lease forms are found in the Supplementary Joint Appendix.

of the term. Upon expiration of the initial fixed rental period, lessor and lessee renogotiate a new rent based upon a percentage of the market value of the land, exclusive of the value of structures on the land. Almost all leases provide for arbitration of conflicting views. The rent that can be charged on the reopening of the stipulated rental, however, has been restricted by legislation.[20] Lessees may freely assign and mortgage their leases.[21] The majority of Trustees' residential leases in effect at the onset of this litigation were executed prior to the enactment of Chapter 516.

III. THE STATUTE.

The true objective of the statute was exposed at its inception, when it was described as a vehicle "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots." [22] The statute demonstrates its unmistakably pri-

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[20] New rent is limited to 4% of a legislatively defined "owner's basis," which drastically reduces the value of Trustees' interest in the lots. Haw. Rev. Stat. § 519-2.

[21] All of these provisions of the leases are further amplified and assured by the "Lessees' Bill of Rights," not in issue in this litigation. Part III of Chapter 516, Haw. Rev. Stat. §§ 516-61 through 70. It applies to all residential lots under long-term lease, and guarantees the right to assign, the opportunity to cure default, the right to extend to a remaining term of 55 years, a formula for determining rent upon extension, and other rights (*see* note 182, *infra*). Part III *does not restrict* the use of the land by the lessee-acquirers, *i.e.*, persons acquiring the lessors' interest under the statute, or protect future lessees unless the new leases are for periods of 20 years or longer.

[22] Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307), 1967 House Journal 859. It is significant that none of the appellants included in their Appendices or the Joint Appendix *any* legislative history—an inclusion which they would have been expected to make in view of their reliance upon legislative findings. The reason for their omission is that the legislative history simply did not include the type of support that ordinarily precedes important legislation of the type encountered here. The legislature

vate objectives throughout its provisions,[23] which, briefly summarized, are as follows:

1. The statute applies to residential lots, located in "development tracts," held under leases for terms of 20 years or more.[24] "Development tracts" are defined as tracts not less than five acres in size.[25]

2. Proceedings under Part II of the statute to take the fee simple title to lots may *never* be commenced on the state's initiative, but may be commenced *only* if and after lessees of at least 25 lots or 50% of the lots (whichever is less) in a development tract have applied to the Hawaii Housing Authority ("HHA") to purchase the fee interest in their lots.[26] Expenses incurred by HHA in the proceedings are to be paid by the applicant lessees, who are re-

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held many hearings, as pointed out by a state court judge in another case relied upon by appellants (*see* Portlock Br. Ex. A26-A59). Yet when that same judge wanted to cite to the information supposedly relied upon by the legislature for its findings—the reports, surveys, treatises, articles, factual summaries, etc., that are normally part of a legislative record—he could only state that the listed materials were "available to and/or before the legislature." *Id.* at A112; *see also id.* at A60-A63. This was evidence of *not* what the legislature *did* consider but of what it *might* have considered. Such surmise can hardly substitute for adequate hearings, reports, and findings during the legislative process itself.

[23] Some of the provisions were declared unconstitutional by the District Court (*see* notes 31, 32, and 57, *infra*). The statute was changed by amendments enacted subsequent to the filing of the complaint. These amendments do not affect the issues presented on this appeal: 1979 Haw. Sess. Laws, Act 227, 1980 Haw. Sess. Laws, Acts 39 and 107, and 1983 Haw. Sess. Laws, Acts 203, 204, and 270 (*see* notes 31 and 32, *infra*).

[24] Haw. Rev. Stat. §§ 516-21, 516-1(5) & (11).

[25] Haw. Rev. Stat. § 516-1(2). Most residential lots are 6,000 to 12,000 square feet in area. Allowing for streets, not more than six lots can be developed per acre.

[26] Haw. Rev. Stat. § 516-22 authorizes HHA to designate all or a portion of a development tract for condemnation only *"after"* the requisite member of lessees have applied for designation (emphasis added).

quired to forward a deposit for that purpose.[27] HHA, after a hearing, must find that acquisition of all or some of the lots in a tract will effectuate the purposes of the statute.[28] Since the Act states that any condemnation is for public use, HHA's hearing and resulting findings are entirely ministerial in nature, as evidenced by experience under the statute.[29]

3. HHA then instructs the lessor and the lessees to negotiate the "just compensation which the *lessees* will pay" for the fee simple title.[30] If the parties fail to agree, HHA directs them to commence compulsory arbitration.[31] Statutory formulae are provided for determination of compensation.[32]

4. HHA obtains from applicant lessees information verifying that they are "qualified" [33] to purchase the les-

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[27] Haw. Rev. Stat. § 516-33.5.

[28] Haw. Rev. Stat. § 516-22.

[29] *See* Transcript of District Court Proceedings, April 24-27, 1979 (preliminary injunction hearing) (JA 164-165).

[30] Haw. Rev. Stat. § 516-51(a) (emphasis added); *see also* HHA JS App. A131-A132 and note 31, *infra*.

[31] Haw. Rev. Stat. Chapter 516, Part IIA, §§ 516-51 through 516-55 (1976 repl.). The compulsory arbitration provisions of this part were declared unconstitutional by the District Court, and HHA was permanently enjoined from taking further action with respect to this statutory provision (*see* note 57, *infra*). No appeal was ever taken from this ruling. Thereafter, the legislature amended the statute to repeal the compulsory arbitration provisions and to provide for mandatory negotiation. 1980 Haw. Sess. Laws, Act 107, § 3. The validity of this amendment and the ones mentioned above (note 23) remains to be tested, but is immaterial if the Court of Appeals' judgment is affirmed.

[32] Haw. Rev. Stat. §§ 516-1(14) (1976 repl.) and 516-24. Exclusive use of these formulae was ruled unconstitutional by the District Court. After this ruling, and purportedly in compliance with it, the legislature amended the statute to preclude sole reliance upon the formulae. 1980 Haw. Sess. Laws, Act 107, § 2 (codified at Haw. Rev. Stat. § 516-1(14) (HHA JS App. A113-A114)).

[33] Haw. Rev. Stat. § 516-33. Among other requirements, the applicant lessee must be the owner of the residence upon the leased premises *and* either have a bona fide intent to live in the development tract *or* be a resident of the state of Hawaii. Haw. Rev. Stat.

sor's fee simple title and financial statements or evidence demonstrating their ability to pay the probable prices at which fee simple titles to their lots will be transferred to them through the condemnation proceedings.[34] HHA then "designates" for acquisition the lots for which qualified lessees have applied,[35] and thereafter institutes a condemnation action against them. While HHA is the nominal party plaintiff, the lessees, as the real parties in interest, are named (along with the lessor-fee simple owner) as parties defendant.[36] Upon conclusion of the condemnation proceedings, the fee simple title to the lots is transferred to the applicant lessees upon their payment of the adjudicated compensation.[37] The remaining lots in the development tract are not involved in the statutory proceedings, but may be adversely affected in fact (note 215, *infra*).

5. Funds to satisfy the condemnation award are supplied entirely by the lessees.[38] While the statute authorizes state bonds to be issued and funds to be appropriated

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§ 516-33(2) & (3). The legislature thus gave its tacit approval to the use of Chapter 516 for speculative purposes, by its recognition that many lessees would not reside in the purchased premises but would instead rent, lease, or sell them.

[34] Haw. Rev. Stat. § 516-33(4).

[35] Haw. Rev. Stat. §§ 516-22 and 516-23. Since HHA need not acquire all lots in the development tract, lots are designated for acquisition in a checkerboard pattern based solely upon the wishes of individual lessees who desire and are financially able to purchase fee title to their lots (*see* Transcript of District Court Proceedings April 24-27, 1979 (preliminary injunction hearing) (JA 164)).

[36] According to HHA, the lessees are named as defendants because they "have a direct interest in the amount of compensation and damages, if any, to be awarded * * *, in that said amount will ultimately be borne by the lessees who purchase the houselots * * *." *E.g.*, Complaint, ¶ 3, filed in 1980 in *Hawaii Housing Authority* v. *Midkiff*, Civil No. 60465 (Haw. Cir. Ct.), a copy of which is attached as Exhibit "A" to Trustees' Memorandum in Opposition to Motion for Partial Summary Judgment, filed in the District Court (Court of Appeals Record, at 158).

[37] Haw. Rev. Stat. § 516-30.

[38] JA 164 (*see also* notes 27 and 36, *supra*).

for HHA acquisitions, no bonds have been issued in the 17 years of the statute's existence, only token funds have been appropriated, and HHA has not supplied any funds for condemned lots.[39]

6. Part III of the statute, often referred to as the "Lessees' Bill of Rights," is not at issue in this case. It should be noted, however, that Part III *does not restrict* the lessee-acquirers from reimposing the same long-term leaseholds the legislature has supposedly found so harmful, or protect new lessees under their new leases unless the new leases are for periods of 20 years or longer.[40]

7. Part IV of the statute sets out legislative findings and declarations, adopted in 1975 when the legislature sought to strengthen the statute's claims to constitutional legitimacy.[41] These recite a concentration of land owner-

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[39] The first attempt to provide public financing occurred in 1971 Haw. Sess. Laws, Act 215, which authorized the issuance of $5,000,000 in general obligation bonds. As noted below (*see* note 51, *infra*), the Hawaii Attorney General challenged the constitutionality of the Act and the use of public credit to finance acquisitions. The bonds were never issued. In 1975, the legislature appropriated $1.3 million for a test case aimed at another lessor's small subdivision. The case was settled, and the test did not come about. Act 270, 1983 Haw. Sess. Laws authorized taxable revenue bonds, but only at private expense. No such bonds have been issued.

[40] Haw. Rev. Stat. §§ 516-61 and 516-1(5). Indeed, other state statutes providing for disposition of public lands make it apparent that there is not now and never has been any government policy against the practice of leasing for a long period, whether of residential or other lands. Disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32. Leasing of public lands for residential purposes is specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Statutory requirements make leases of public lands more restrictive than those made by private landowners who have conformed their lease forms to FHA and VA requirements.

[41] The legislature recited that although the Act "has been in full effect for nearly six years it has not been implemented" for reasons including "possible legal or constitutional difficulties * * *." 1975 Haw. Sess. Laws, Act 186, § 1 (HHA JS App. A152). Interestingly, the Hawaii Attorney General had previously brought suit to have the Act declared unconstitutional on the ground, among others,

ship in a few hands;[42] claim that the practice of leasing rather than selling has resulted in a shortage of "fee simple residential land";[43] refer to the high cost of land and the need to check the "inflationary trend of land";[44] and assert the right of the state to exercise the power of eminent domain for the purpose of "allowing lessees under long-term leases of residential land to purchase [that land] * * *."[45] As the Court of Appeals properly recognized, the findings are mere rationalizations for clearly private takings (HHA JS App. A21).

8. Further emphasizing the private motivation of the statute is its history of amendments, which have progressively facilitated acquisitions by private lessees and have relegated the role of HHA to the purely ministerial function of acting as a conduit for transfer of title. For example, the original statute required HHA to condemn only *entire* development tracts, but a 1975 amendment allows condemnation of only those lots which lessees have applied to purchase.[46] In 1976, probably recognizing that

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that it failed to satisfy the Public Use requirement. That suit was never pursued to a judgment on the merits (*see* note 51, *infra*).

[42] Haw. Rev. Stat. § 516-83(a)(1). Notwithstanding repeated assertions in HHA's brief to the contrary, the Hawaii Legislature has made no finding, nor has any court ever found, that a "land monopoly" exists in Hawaii. As a basis for its extensive "land monopoly" argument (HHA Br. 1-6), HHA relies upon a single committee report (Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799), the loose language of which was never adopted by the legislature. A private antitrust suit brought several years ago against various landowners, including Trustees, remains at the pretrial discovery stage. *Souza* v. *Estate of Bernice Pauahi Bishop*, Civil No. 79-0339 (D. Haw. Mar. 6, 1981) (Opinion and Order denying class certification), *petition for permission to appeal denied*, No. 81-8029 (9th Cir. Apr. 6, 1981) (Order).

[43] Haw. Rev. Stat. § 516-83(a)(2).

[44] Haw. Rev. Stat. § 516-83(a)(6) & (7).

[45] Haw. Rev. Stat. § 516-83(a)(9).

[46] *Compare* 1967 Haw. Sess. Laws, Act 307, § 11, *with* 1975 Haw. Sess. Laws, Act 184, § 2(6) (codified at Haw. Rev. Stat. § 516-22) (*see* note 35, *supra*).

fee simple residential properties are indeed readily available (notwithstanding "findings" to the contrary), the legislature deleted the requirement that HHA find a shortage of fee simple residential properties before designating lots for acquisition.[47] In 1978, the legislature made it possible for lessee-speculators to take advantage of this statute by removing the requirement that the lessee-acquirer live in the tract to be condemned.[48]

IV. THE COURSE OF THE PROCEEDINGS.

A. Background.

The initial version of Chapter 516 was enacted as Act 307 in 1967.[49] For nearly a decade the statute lay dormant,[50] in part due to unanswered questions regarding its constitutionality,[51] and in part due to the continuance

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[47] *Compare* 1967 Haw. Sess. Laws, Act 307, § 11, *with* 1976 Haw. Sess. Laws, Act 242 § 2 (codified at Haw. Rev. Stat. § 516-22). Note, also, that a statute enacted prior to Chapter 516, that is, 1961 Haw. Sess. Laws, Act 6 (codified at Haw. Rev. Stat. Chapter 206), authorized the Hawaii Board of Land and Natural Resources to acquire land for residential development if, after public hearing, it found "that in any locality on the island of Oahu an acute shortage of residential fee simple property exists." Haw. Rev. Stat. § 206-5. In the 23 years the statute has been on the books, the Board has neither made any such finding nor acquired any land for development.

[48] 1978 Haw. Sess. Laws, Act 140, § 2 (codified at Haw. Rev. Stat. § 516-33(2)); *compare* § 516-33(2) (1976 repl.). Another recent amendment, substituting mandatory negotiation of price for mandatory arbitration, preserves the lessee's opportunity to withdraw before condemnation if the negotiations indicate he may be compelled to pay a price not to his liking. 1980 Haw. Sess. Laws, Act 107, § 3 (codified at Haw. Rev. Stat. § 516-51).

[49] 1967 Haw. Sess. Laws, Act 307.

[50] Prior to these proceedings, all actions under the purported authority of the statute were carried out by voluntary agreement among the lessors and the lessees (*see* Transcript of District Court Proceedings April 24-27, 1979 (preliminary injunction hearing) (JA 164)).

[51] Act 307 gave the Hawaii Supreme Court original jurisdiction of suits questioning the statute's constitutionality—a provision re-

of low rents fixed at the inception of the leases.[52] Beginning in 1978, after a series of liberalizing amendments to improve the lessees' litigation position,[53] Trustees' land became a target for acquisition under Chapter 516. After disposing of inconsequential administrative prerequisites to the involuntary condemnation of Trustees' fee title, HHA on January 22, 1979, directed Trustees to submit to mandatory arbitration for prima facie determination of the prices to be paid to Trustees by lessees in Tract H of the Waialae-Kahala subdivision in Honolulu for the taking of the fee simple title.[54] Under state law, none of these administrative proceedings was part of any later-filed state court condemnation suit;

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pealed in 1975. Trustees filed two such actions in 1967 (*Midkiff* v. *Hasegawa*, No. 4727, and *Midkiff* v. *McCormack*, No. 4728), and another residential lessor filed a similar action (*Davis* v. *Finance Realty*, No. 4735). HHA and the State of Hawaii were defendants in the three suits. When the legislature rendered moot many of the questions raised, through statutory amendments designed to blunt the Complaints (1968 Haw. Sess. Laws, Act 46), the suits were dismissed without prejudice. Recognizing that the legislature could legislate faster than Trustees could litigate, Trustees declined to seek judicial protection again until the statute was applied against them. Meantime, in 1975, the Hawaii Attorney General brought suit against the Hawaii Budget Director challenging the constitutionality of the statute on the ground, among others, that it provided for taking private property for non-public uses. This, too, was dismissed without prejudice. *State* v. *Anderson*, Civil No. 43937 (Haw. Cir. Ct.).

[52] In most residential leases, rent is fixed for a period of 25 to 40 years, with rent for the remaining term to be renegotiated or arbitrated at the end of the fixed rent period (typical leases are reprinted in the Supplemental Joint Appendix). Rents fixed in many leasehold tracts developed shortly after World War II became less than nominal as land values increased. Thus, until these rents began to come up for renegotiation in the 1970's, there was no economic incentive for a lessee to abandon the rent bargain by purchasing fee title.

[53] *See, e.g.*, notes 46-48 and accompanying text, *supra*.

[54] HHA JS App. A102 n.52. Trustees and the lessees in Tract H ultimately agreed upon a voluntary sale, and the Tract H Community Association withdrew from participation in this lawsuit.

Haw. Rev. Stat. § 516-51(b) (1976 repl.) explicitly provides that "[t]his mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain."[55] Nonetheless, Trustees felt that the threat to their property was no longer speculative. Rather than submit to mandatory arbitration, Trustees brought the present action.

B. The Proceedings Below.

1. Before any state court condemnation suits were filed against them,[56] Trustees filed this suit on February 28, 1979, seeking a declaratory judgment that Chapter 516 is unconstitutional and an injunction against its enforcement.[57] In its answer, HHA adverted to only the doctrine of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), as a basis for abstention, and did not assert

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[55] After the District Court had ruled that the mandatory arbitration provisions were unconstitutional, the legislature amended this section to substitute the term "preliminary negotiation" for the term "mandatory arbitration" (1980 Haw. Sess. Laws, Act 107, § 3; HHA JS App. A131-A132).

[56] The Court of Appeals' express finding to this effect (HHA JS App. A2-A4 n.1) is plainly correct.

[57] Trustees' complaint (JA 45 *et seq.*) asserted that the use of eminent domain for the taking of fee simple titles for transfer to lessees was solely for private use in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Moreover, the complaint alleged that the Act was an arbitrary exercise of the state's police power, in violation of the Fourteenth Amendment Due Process Clause. The complaint also alleged that the statute did not vest power in the state or its agency, HHA, to make the essential determination as to which, if any, lots should be taken, but, rather, unconstitutionally delegated that power to lessees. Further, the complaint alleged that the statute contravened the Contract Clause of the Constitution because it abrogated the terms of pre-existing lease contracts.

The complaint also asserted the unconstitutionality of the compensation and the compulsory arbitration provisions of the statute; these provisions were held unconstitutional by the District Court and are not in issue before this Court (*see* HHA JS App. A95-A101; JA 106-107).

that any other abstention doctrine was appropriate.[58] Several private organizations, representing lessees of appellees' property, later intervened.[59] Like HHA, the only abstention doctrine adverted to in any of the intervenors' answers was *Pullman* (JA 76, 80).[60]

The District Court, on February 28, 1979, issued a temporary restraining order against enforcement of the Act, which it modified on March 27, 1979, to permit all procedural steps under the statute prior to mandatory arbitration and condemnation (HHA JS App. A78 & n.5). Trustees also moved for a preliminary injunction against the further enforcement of Chapter 516. In their oppositions to Trustees' motion, the only abstention

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[58] The only sentence in HHA's answer relating to abstention, Paragraph 18 (JA 64), stated:

> This court should abstain from ruling on the matters raised in the Complaint until such time as State courts have provided authoritative interpretations of provisions of Chapter 516, Hawaii Revised Statutes, which interpretations may preclude the necessity for a decision of the constitutional issues raised by the Complaint.

HHA later made clear, in its opposition to appellees' motion for a preliminary injunction, that the *only* abstention doctrine about which it was concerned, and which it was presenting to the District Court, was *Pullman* (see JA 82-86).

In a similar vein, Paragraph 8 of HHA's answer denied that any of the precomplaint administrative activities were steps leading toward the appropriation of Trustees' lots (JA 49), and Paragraph 17 alleged as a defense that Trustees' constitutional objections to the statute were "not ripe for adjudication" (JA 64).

[59] On March 23, 1979, the District Court granted motions of certain community associations, representing lessees, to intervene (JA 66-67). Some of these associations later withdrew from the case after their members purchased the fee titles to their lots in negotiated transactions. Except for one who did not appeal, the remaining intervenors are appellants now before the Court.

[60] Furthermore, intervenors admitted in their answers that Chapter 516 itself makes clear that the administrative proceedings antedating the filing of appellees' suit in federal court were "not part of any action in condemnation or eminent domain" (JA 71).

doctrine adverted to by HHA and some intervenors was *Pullman* (JA 81-86; *see* note 58, *supra*). After a hearing, the District Court issued its decision on Trustees' motion on May 8, 1979 (HHA JS App. A77 *et seq.*). The preliminary injunction itself was entered one month later, on June 8, 1979. The District Court did not enjoin condemnation of the fee simple title to leasehold lots,[61] but did restrain compulsory arbitration and exclusive use of the valuation formulae provided by the statute (JA 91-92). There were still no state court condemnation proceedings involving Trustees filed by this time. The first such suit against Trustees was filed on September 21, 1979 (HHA JS App. A30 (Poole, J.)).

After entry of the preliminary injunction, HHA and intervenors abandoned even their prior limited allusions to abstention. Without claiming that abstention was appropriate for *any* reason, they moved for partial summary judgment, asking the District Court to uphold the statute on the basis of the legislative findings. The first of these motions was filed on September 18, 1979 (JA 16, 93-94), still prior to the filing of any state court proceedings involving Trustees.

2. The District Court denied Trustees' demand for a trial, reaffirmed its prior rulings concerning mandatory arbitration and the valuation formulae, and, subject to such rulings, granted summary judgment against Trustees, holding that the condemnations authorized by Chapter 516 were for a public use.[62] It ruled that compelling "redistribution" (HHA JS App. A74)[63] of Trustees'

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[61] The District Court found that no state court judicial condemnation proceedings were imminent (HHA JS App. A104 n.58).

[62] The District Court's decision was embodied in its Amended Memorandum Decision on December 19, 1979 (HHA JS App. A64 *et seq.*).

[63] The use of this phrase throughout the District Court's opinion is unwarranted. No "land" redistribution is involved. The lessees (or their tenants) are already in possession, and only the "fee sim-

property to lessees is within the state's police power, and "hence" the takings are for a constitutional public use (*id.* at A67-A73). Alternatively, it held that the legislature's "economic findings" furnished an adequate basis for upholding the statute (*id.* at A74-A75).[64] Trustees appealed.

3. No appellant initially argued in the Court of Appeals that abstention was required for any reason; the Ninth Circuit panel raised this issue on its own during oral argument (HHA JS App. A30 & n.7 (Poole, J.)). After requesting and receiving post-argument briefing on this issue—in which both HHA and certain intervenors argued that abstention was *unwarranted* for *any* reason and asked the Court of Appeals to reach the merits of Trustees' claims—a majority concluded that abstention would have been improper (*id.* at A2-A4 n.1; *id.* at A22-A31 (Poole, J.)).[65]

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ple" interest is "redistributed"—taken from the owner and transferred to those lessees who apply and pay therefor.

[64] Finally, the District Court granted HHA's and intervenors' motion for partial summary judgment, ruling against Trustees on the remainder of their constitutional claims. A Final Judgment and Permanent Injunction, incorporating all rulings of the District Court, was entered on June 10, 1980 (JA 106-108).

[65] *First.* The court ruled that abstention was unnecessary under *Pullman* because of the clear statement of legislative intent in Haw. Rev. Stat. § 516-83(a)(12). Hence, there was no uncertain issue of state law, only the question of whether Chapter 516 was constitutional (HHA JS App. A2-A4 n.1; *id.* at A23-A24 (Poole, J.)).

Second. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), did not require abstention because Hawaii had not funnelled all condemnation suits (and challenges thereto) into a single specialized court, and there was no question, inseparable from the federal claims, of whether the state had authority to effect these condemnations (*id.* at A2-A4 n.1; *id.* at A24-A25 (Poole, J.)).

Third. *Younger* v. *Harris*, 401 U.S. 37 (1971), did not require abstention because there were no state court proceedings pending at the time the District Court had entered a temporary restraining order (February 28) and, later, a partial preliminary injunction (June 8), since HHA did not file its first eminent domain suit against Trustees in state court until September 1979 (*id.* at A2-

On the merits, the court, by a divided vote, reversed. It ruled that Chapter 516 was unconstitutional because the Act simply transferred land from one private party to another in violation of the Public Use requirement of the Fifth and Fourteenth Amendments.[66]

C. State Court Proceedings.

At the time Trustees filed this suit, there were no pending state court proceedings involving, or which could have involved, Trustees' constitutional objections to the statute.[67] In fact, no such state court proceedings were

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A4 n.1). Judge Poole also concluded that HHA had waived any *Younger* claim (*id.* at A26-A31).

Fourth. Judge Poole concluded that *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800 (1976), was inapplicable because there were no exceptional circumstances, such as the McCarran Amendment, favoring state court litigation (*id.* at A25-A26).

[66] The Court of Appeals concluded: " 'It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain. * * * For if the use be not public * * * the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required' " (*id.* at A20, quoting *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905) (citation omitted); *see id.* at A33 (Poole, J.)). Because of the court's ruling, it did not consider Trustees' other arguments.

[67] None of the proceedings to which appellants refer (HHA Br. 9-11) was pending on the issues raised herein:

(1) *Wai-Kahala Tract "H"* v. *Midkiff*, Civil No. 55837:

On August 21, 1978, HHA directed Trustees to appoint an arbitrator within 30 days to establish just compensation for certain of their lots in Waialae Kahala Tract H. Upon expiration of that period, during which Trustees failed to appoint an arbitrator, the Tract H Community Association filed its complaint in Civil No. 55837 in Hawaii Circuit Court on September 29, 1978. That complaint sought only to have the Hawaii Circuit Court order mandatory arbitration pursuant to Chapter 516, and to appoint an arbitrator for Trustees because of Trustees' refusal to do so. The complaint did *not* put in issue the constitutionality of Chapter 516. Trustees filed their answer on October 10, 1978, claiming basically that the Circuit Court lacked jurisdiction over this matter, and that the plaintiff lacked standing to prosecute its complaint. After an evidentiary hearing, the Circuit Court entered its Findings of

filed until months after the District Court had issued a preliminary injunction restraining the use of the man-

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Fact and Conclusions of Law and Judgment on November 29, 1978. The Judgment recited that the suit was premature, and remanded the case to HHA for compliance with the procedural prerequisites for arbitration, including a valid determination of public use. Contrary to the claims of HHA (HHA Br. 10), its determination of public use for Wai-Kahala Tract H did not occur until October 20, 1978, and lots in that tract were not designated for acquisition until September 21, 1979. The Judgment was never appealed and became final. The *Wai-Kahala Tract "H"* case languished inactive; eventually, a stipulation for dismissal was entered on November 7, 1980.

Hence, the only matters in issue in *Wai-Kahala Tract "H"* were the authority of certain private plaintiffs to represent the Tract H lessees, and the HHA's compliance (or lack thereof) with the governing statute and regulations. No issue of the constitutionality of Chapter 516 was ever raised by any party and, indeed, could not have been inasmuch as the mandatory arbitration sought to be enforced was not a part of any condemnation under Chapter 516. Haw. Rev. Stat. § 516-51(b) (1976 repl.); *see also* HHA JS App. A131-A132 and text accompanying note 55, *supra*).

(2) *Midkiff* v. *Amemiya*, Civ. No. 47103:

This case involved the constitutionality of the residential rent control law, Haw. Rev. Stat. § 519-2, *not* Chapter 516. Trustees brought suit against state officials and individual Wai-Kahala Tract A lessees for declaratory relief on December 29, 1975. The complaint focused exclusively upon Tract A and the question of the constitutionality of limiting renegotiated lease rents through Section 519-2 (the complaint was amended on February 27, 1976, but only to add and delete certain individual Tract A lessees). No issue was raised as to Chapter 516 in the complaint, the amended complaint, or the answers filed by the state and the lessees respectively.

On June 29, 1978, the Circuit Court issued its Findings of Fact and Conclusions of Law upholding the constitutionality of Section 519-2. The Findings and Conclusions make clear that the case was concerned exclusively with the constitutionality of Section 519-2. Thereafter, during the pendency of an appeal, the case settled and was rendered moot. Trustees filed a Motion for Partial Dismissal of Appeal and Partial Vacation of Judgment on grounds of mootness on April 7, 1982, which was granted by Order No. 7294 filed by the Supreme Court on April 14, 1982. Reconsideration was denied by Order entered on April 16, 1982. Further proceedings were therefore restricted to the issue of attorneys' fees and costs. Judgment on Appeal was filed by the Supreme Court on May 18, 1982,

datory arbitration and exclusive valuation provisions of the statute.[68] With a single, inconsequential exception

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along with the Notice of Judgment on Appeal (the notice directed to the Circuit Court concerning final disposition of the appeal). Pursuant to the Notice of Judgment on Appeal, the Circuit Court entered its Order Dismissing Plaintiffs' Complaint as Moot on June 3, 1982. The case then had been finally concluded, without any resolution of the constitutionality of Section 519-2, much less any binding determination as to the validity of Chapter 516.

(3) *Hawaii Housing Authority* v. *Midkiff*, Civ. No. 63408 (Haw. Cir. Ct. Sept. 6, 1983) (the "Kamiloiki Valley" Case):

HHA did not file its complaint against Trustees until November 10, 1980, well after the District Court had entered its final judgment in this case and while this case was pending on appeal before the Court of Appeals. HHA clearly errs in contending that "the Kamiloiki Valley case * * * beg[a]n before this federal action was filed" (HHA Br. 11). A public hearing on the Kamiloiki tract was held a week before the federal complaint was filed, but not even a preliminary determination of public use was made by the HHA until March 30, 1979, much less any designation of lots for acquisition, which did not occur until October 17, 1980. HHA errs in its suggestion (HHA Br. 10) that Trustees could have litigated their constitutional rights before HHA in this case; the letter referred to by HHA was merely designed to give HHA notice of Trustees' intention to have their constitutional claims adjudicated before a competent court. As to the current status of the case, *see* note 69, *infra*.

(4) *Hawaii Housing Authority* v. *Castle*, 65 Haw. Adv. 465, 653 P.2d 781 (1982) and *Hawaii Housing Authority* v. *Brown*, No. 8489 (Haw. Nov. 10, 1982) (unpublished opinion):

Trustees were not a party to either suit. More importantly, both suits were filed in 1980 more than a year after Trustees filed this suit. Brown and his co-trustees of the King Lunalilo Trust, far from being a "major land-owning estat[e]" (HHA Br. 11), own the grandiose total of fifteen acres.

[68] The District Court issued its preliminary injunction on May 8, 1979 (HHA JS App. A77 *et seq.*) The first state condemnation actions involving Trustees were not filed against Trustees until September 21, 1979. *Hawaii Housing Authority* v. *Midkiff*, Civ. Nos. 59191, 59201, & 59202. All three suits were subsequently dismissed. The next state court condemnation suit still pending was not filed until May 7, 1980, a half year after the District Court filed its Amended Memorandum Decision, and just prior to Trustees' filing of their notice of appeal.

(*see* note 68, *supra*), all of the 25 condemnation suits currently pending against Trustees were filed subsequent to Trustees' appeal from the District Court's judgment, some as recently as July 15, 1983.

Trustees' proof that they, their Schools, and the schoolchildren they serve would be irreparably harmed unless these proceedings were stayed pending final disposition of this case convinced the Court of Appeals to recall its mandate for clarification after the District Court refused to grant Trustees an injunction. *Midkiff* v. *Tom*, No. 80-4368 (Aug. [illegible] 1983) slip op. 1-2 (*see generally* No. 83-236 Motion to Affirm 7-10). Pending issuance of that revised mandate, the court enjoined HHA, intervenors, and related parties from pursuing any ongoing or future condemnation suits under Chapter 516 (slip op. 2).[69] Briefing and oral argument have now been completed. No decision has yet been rendered.[70]

SUMMARY OF ARGUMENT

1. *Abstention.* The Court of Appeals was manifestly correct in holding that the doctrine of abstention was no bar to the clear jurisdiction of the federal courts to hear this case. The only two doctrines asserted in this Court are *Pullman* and *Younger*. HHA alone argues *Pullman*, but after originally raising the matter in its answer, it

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[69] Of the 25 cases, only one, the "Kamiloiki Valley" Case, has even been partially tried. Findings of Fact and Conclusions of Law were filed on September 6, 1983 (Portlock Br. Ex.), and Judgment was filed on September 29, 1983. Because of post-judgment motions, Trustees' time to file a notice of appeal has not yet expired. Inasmuch as the Court of Appeals' temporary injunction pending issuance of the revised mandate only affects appellants, and not the state courts, HHA errs in its assertion that the Court of Appeals' injunction prevents state court appellate review (HHA Br. 11).

[70] Without awaiting the issuance of that revised mandate, appellants twice sought, unsuccessfully, a stay of the Court of Appeals' Order from Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit. *Hawaii Housing Authority* v. *Midkiff*, No. A-113 (1983) (in Chambers); *Hawaii Housing Authority* v. *Midkiff*, No. A-278 (1983) (in Chambers).

thereafter affirmatively argued that *Pullman* did not apply. The doctrine has therefore been waived. Moreover, *Pullman* is appropriate only when there are uncertain questions of state law that should be resolved in the state courts. Here, no such questions are present. On the Public Use issue, for example, the statute could not possibly be interpreted in any way except as it reads. Apparently recognizing this, HHA's argument is that the state courts should be allowed to rewrite the statute—a theory foreign to the *Pullman* doctrine.

Younger has also been waived. HHA asserts the doctrine for the first time in this Court, having sought a decision on the merits in both federal courts below. A ruling for HHA would allow states to seek a federal resolution until it became clear they would lose, and then claim abstention for the first time in this Court. The private appellees also failed to urge *Younger* below and, in any event, should not be able to force abstention where the state has decided that its interests are most appropriately presented in federal court. Moreover, *Younger* would not be applicable even if properly asserted. Trustees' complaint was filed in federal court months in advance of any state court condemnation action. By the time there was a pending state action, there had been significant, substantive proceedings on the merits in federal court: for example, a TRO and preliminary injunction had been issued and a motion for summary judgment filed. The Hawaii statute expressly provides that administrative proceedings are separate from any condemnation action, and, in any event, Trustees' constitutional claims could not have been adjudicated in those proceedings.

2. *Public Use.* The Court of Appeals correctly held that the Hawaii statute violates the Public Use requirement of the Fifth and Fourteenth Amendments by simply transferring property from *A* to *B*. The statute is unprecedented in its reach and sweep. In no prior case have all of the following factors been present: (a) the takings may only be initiated by the very people who will receive

the property; (b) the takings are paid for by the private recipients of the transfer; (c) the only property taken consists of the ground lots upon which the new owners already own houses; (d) the takings transfer property from one private party to another; (e) the takings effect no change in the use or usability of the property or its environs; (f) there is no continuing government oversight, regulation, or control once the transfer to other private parties is completed; and (g) there is no obligation on the part of the parties receiving the property to conform to any predetermined plan for its use.

When all of these factors are present, the courts need not "second guess" a legislature or its "findings"; the private nature of the taking is apparent upon the face of the statute. But even if this argument were rejected, the courts are not mere passive observers of the legislative role. The purported legislative justifications for the takings here are shown to be nothing more than mere rationalizations.

Berman v. *Parker*, 348 U.S. 26 (1954), is not to the contrary. While some of its language is broad, the case itself was a slum clearance case in which at least seven factors were present that are not present here. If the Court believes that the *Berman* dicta does control, that dicta should be reexamined.

3. *Due Process and Contract Clauses.* Other independent grounds—which the Court of Appeals did not have to reach—confirm the statute's constitutional invalidity. The statute denies Trustees' due process rights because its means bear no rational connection to any legitimate public purpose, and it impermissibly delegates legislative power to private lessees who are personally and financially self-interested and not accountable to the affected landowners or the general public. Furthermore, Chapter 516's retroactive application to Trustees' preexisting lease contracts not only impairs but destroys the obligations of those lease contracts in violation of the Contract Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT ABSTENTION WOULD HAVE BEEN IMPROPER.

A. *Pullman* Abstention Is Inappropriate Because It Has Been Waived, and the Federal Constitutional Questions Are Clearly and Unavoidably Presented.

Of all the appellants, only HHA argues *Pullman* abstention, but its argument has been waived. HHA raised this matter in its answer, but thereafter either failed to assert it at all or affirmatively argued that *Pullman* did *not* require abstention (JA 122-125). In any event, HHA's argument must fail.[71]

It is well settled that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" (*Colorado River*, 424 U.S. at 813), and "sanctions • • • escape [from immediate decision] only in narrowly limited 'special circumstances.'" *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973) (citation omitted). In that regard, "a state's power of eminent domain no more justifies abstention than the fact that [the case] involves any other issue related to sovereignty." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 192 (1959). It is equally clear that one of those "special circumstances," *Pullman* abstention, is appropriate only where a state court resolution of an uncertain question of state law may moot or substantially alter the posture of a federal

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[71] HHA and Portlock made passing references to *Burford* and *Colorado River* in their Jurisdictional Statements and Briefs on the merits, but do not rest upon these doctrines (*see* HHA Br. 36-46; Portlock Br. 13-17). All appellants have now clearly waived any such claim. Furthermore, neither doctrine is applicable here. *See* No. 83-236 Motion to Affirm 22-24 & n.33. In addition, application of either doctrine here is inconsistent with the intent of the Congress that adopted Section 1983. *Cf. Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982); *Mitchum* v. *Foster*, 407 U.S. 225, 239-242 (1972); *McNeese* v. *Board of Education*, 373 U.S. 668, 671-673 (1963); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961).

constitutional question.[72] Where the applicable state law is clear, even though never before interpreted by a state court, and "the naked question * * * is whether the Act on its face is unconstitutional," *Pullman* abstention is unwarranted. *Wisconsin* v. *Constantineau*, 400 U.S. at 439; *see also Harman* v. *Forssenius*, 380 U.S. 528, 534-535 (1965).

No uncertain state-law question is present here. As the Court of Appeals observed, Haw. Rev. Stat. § 516-83 (a) (12)[73] is "perfectly clear" and "unambiguously states" that "'[t]he use of the power to [sic] eminent domain [under Chapter 516] is for a public use and purpose' * * *" (HHA JS App. A2-A4 n.1 (quoting § 516-83(a) (12)). The state legislature could not have stated its intention more clearly. Only by "perform[ing] a remarkable job of plastic surgery upon the face of the statute" (*Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969)) could anyone construe it in another manner. Accordingly, the Court of Appeals' conclusion that abstention was unjustified is inescapable.[74]

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[72] *E.g.*, *Babbit* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Zablocki* v. *Redhail*, 434 U.S. 374, 379-380 n.5 (1978); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967).

[73] Section 516-83(a) (12) provides:

> The use of the power to [sic] eminent domain to condemn the fee simple title to residential land and the payment of just compensation therefor for the purpose of making the fee simple title thereto and the use thereof available for acquisition by people who are lessees under long-term leases of such land and on which such land their homes are situated is for a public use and purpose.

To the same effect are Haw. Rev. Stat. §§ 516-83(a) (10), 516-83(a) (11), (13), and 516-83(b).

[74] No appellant has ever cited any other provision of Chapter 516 suggesting that Section 516-83(a) (12) does not mean exactly what it says, or any provision of that *existing* Act—rather than ones Hawaii has never enacted—in any way negating or modifying the plain language of Section 516-83(a) (12). In fact, any such contention would be plainly inconsistent with HHA's insistence that

HHA argues that (1) the state courts should be permitted to remedy the federal constitutional flaws in Chapter 516 by adding provisions thereto that the state legislature omitted (HHA Br. 38-40), or (2) the state courts should be permitted to invalidate the Act on state constitutional grounds (HHA Br. 40-41 n.84).[75] Neither position merits serious consideration.[76]

HHA's first argument is not that a state court could *construe* Chapter 516, as currently written, in a manner that would moot or alter the federal constitutional questions involved here. Rather, HHA's argument is that *Pullman* abstention is appropriate to allow the state courts to *redraft* Chapter 516 to rehabilitate its constitutional deficiencies. That contention is untenable. Just as *Pullman* does not require abstention pending the enactment of a new statute by the state legislature, so too *Pullman* does not require abstention pending the *reconstruction* of an already-existing state law by the state courts. *See Procunier* v. *Martinez*, 416 U.S. 396, 403-404 (1974);

"[t]he legislature concluded * * * that the Act would realize public purposes and put land to public use" (HHA JS 4 (footnote omitted); *see* HHA Br. 6).

[75] In fact, HHA has shifted horses with respect to this argument. In its Jurisdictional Statement, HHA argued that Chapter 516 was clear on its face and that abstention was appropriate only because of the possibility of a state court decision invalidating Chapter 516 on state constitutional grounds (HHA JS 24-25). For the reasons given in our Motion to Affirm in No. 83-236, at 13-14, and in the text, that argument must fail. By contrast, HHA has now recognized that Chapter 516 cannot pass muster as written, and has sought abstention under *Pullman* to permit the state courts "to conclude the final stage of the state's legislative process * * *" (HHA Br. 40)—a virtual admission that the supposed findings contained in Chapter 516 themselves cannot sustain the Act's constitutionality.

[76] Portlock's recent, heavy reliance upon *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593 (1968), is clearly misplaced. In that diversity action, this Court's six-member per curiam decision to abstain in favor of a pending state court proceeding rested upon the uncertain interface of the state's water allocation laws with its eminent domain power. *Id.* at 594.

Wisconsin v. *Constantineau*, 400 U.S. at 439.[77] *Pullman* envisions only a "state court *construction*" of a law already on the books (*Zwickler* v. *Koota*, 389 U.S. at 250 (emphasis added)), and where that interpretation "cannot narrow [the act's] allegedly indiscriminate cast" (*id.*), *Pullman* abstention is inappropriate. *See, e.g., Harman* v. *Forssenius*, 380 U.S. at 534-535, and cases cited in note 72, *supra*.[78]

HHA's second argument is equally unavailing. This Court has twice rejected the argument that *Pullman* requires abstention, notwithstanding an unambiguous state statute, simply because of the hypothetical possibility that state courts might invalidate the statute under a parallel provision of the state, rather than the federal, Constitu-

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[77] In fact, the state legislature deliberately omitted the antitrust predicate HHA now seeks to add to the Act (*see* note 42, *supra*).

[78] HHA's argument must also fail for three additional reasons.

First. By seeking a state court construction of Chapter 516 simply to assure that the state courts can supplement the job of the state legislature—a proposition which, of course, would justify abstention in *every* case—HHA is really asking for nothing more than the opportunity initially to litigate the constitutionality of Chapter 516 in the state courts. This Court has clearly ruled, however, that *Pullman* abstention is never justified simply to provide the state courts with the first opportunity to rule on a federal constitutional question. *See, e.g., Zwickler* v. *Koota*, 389 U.S. at 250-251 & n.14, and cases cited therein.

Second. HHA suggests that only "a series of localized as applied" adjudications would be sufficient fully to clarify the meaning of Chapter 516 (HHA Br. 38). But this Court has often recognized that the need for multiple separate adjudications to construe a statute renders *Pullman* abstention inadvisable. *See, e.g., Procunier* v. *Martinez*, 416 U.S. at 401 n.5; *Baggett* v. *Bullitt*, 377 U.S. 360, 378 (1964).

Third. Because the *Pullman* doctrine is based upon equitable considerations (312 U.S. at 500-501), factors such as the delay and injury that could be suffered by the federal plaintiff and the state's failure to raise this doctrine in the lower courts should be considered before ordering abstention. *See, e.g., Harman* v. *Forssenius*, 380 U.S. at 537; *Baggett* v. *Bullitt*, 377 U.S. at 378-379; *Hostetter* v. *Idlewild Bon Voyage Liquor Co.*, 377 U.S. 324, 329 (1964). Here, those considerations plainly militate against abstention.

tion. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin* v. *Constantineau*, 400 U.S. at 437-439. Under the contrary rule, *Pullman* abstention would be appropriate in *every* case because, as HHA admits (HHA Br. 40-41 n.84; *see* HHA JS 24 & n.61), state courts can always invalidate state laws on state constitutional grounds, thereby "convert[ing] abstention from an exception into a general rule." *Examining Board*, 426 U.S. at 598 (footnote omitted).[79] Appellants' argument is thus at odds with *Examining Board* and *Constantineau*.

Finally, the fact that a state court is not likely either to interpret Chapter 516 in some unique way or to invalidate it under the state Constitution is borne out by the only state court decision on the subject, *Hawaii Housing Authority* v. *Midkiff*, Civil No. 63408 (Haw. Cir. Ct. Sept. 6, 1983).[80] While the state Circuit Court disagreed with the Court of Appeals regarding the constitutionality of Chapter 516,[81] it did not interpret the statute differently, nor did it find the Act in conflict with the Hawaii Constitution.[82]

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[79] For instance, in *Examing Board* the Court ruled that the presence of an equal protection guarantee in the Puerto Rico Constitution did not require abstention to avoid decision under the Fourteenth Amendment's Equal Protection Clause. 426 U.S. at 598. Here, the Public Use provision of the Hawaii state Constitution is also not a specialized matter (*id.*), but is similar to the federal provision (*see* HHA JS App. A23 (Poole, J.)).

[80] *See* Portlock Br. Ex. A-1 *et seq.*

[81] This decision (*see* notes 67 ¶ (3) and 69, *supra*) was rendered well after the Court of Appeals had ruled, and entirely ignored the Court of Appeals' opinion. Its findings of fact and conclusions of law contain no reference whatsoever to the Ninth Circuit's judgment or opinions declaring the condemnation provision of Chapter 516 facially unconstitutional, nor any reference to Trustees' defense that that judgment was *res judicata* upon the federal constitutional issues.

[82] Moreover, none of the reasons given by the dissent in the Court of Appeals for *Pullman* abstention can pass muster.

First. The argument that the federal constitutional question need not be reached if the state can regulate the lessees' post-acquisition use of their new leaseholds hypothecates state-court

B. *Younger* Has Been Waived and in Any Event Does Not Require Abstention.

1. HHA has clearly waived any *Younger* claim. HHA did not rely upon *Younger* in its answer to Trustees' complaint (JA 61-65), in any paper it filed with the District Court (JA 81-86, 99-100, 105), in its initial brief filed with the Court of Appeals (JA 115-116), in its supplemental post-oral argument brief filed with that court (JA 131-137)—a brief filed in response to the Court of Appeals' specific request that the parties identify their positions on abstention (*see* HHA JS App. A30 & n.7 (Poole, J.))—or in its petition for rehearing and suggestion for rehearing *en banc*. The first time HHA invoked *Younger* was in its Jurisdictional Statement filed with this Court. There is no question that the state can waive a *Younger* claim,[51] and HHA's actions in this regard clearly satisfy

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interpretations of a statute Hawaii has *never* enacted. No provision of the *existing* Act regulates lessees' post-acquisition use—a point which was noted by the Court of Appeals' majority (*see, e.g.*, HHA JS App. A17-A18; *id.* A32-A33, A36 (Poole, J.)) and not denied by the dissent. *Pullman* does not require a federal court to await a state court interpretation of an as-yet-unenacted state law before considering a federal constitutional claim.

Second. The "possibility of a constitutional construction of the statute" (HHA JS App. A48) is based upon the dissent's interpretation of the federal Constitution, *not* Chapter 516 (HHA JS App. A48, referring to dissent at A53-A60). A federal court may not abstain under *Pullman*, however, simply for that reason. *Zwickler* v. *Koota*, 389 U.S. at 250-251 & n.14.

Third. The dissent's distinction between cases involving racial or gender discrimination and land use (HHA JS App. A48-A49) is based entirely upon an earlier *dissenting* opinion by the same author (*id.* at A49), is contrary to well-established precedent (*e.g.*, *Harrison* v. *NAACP*, 360 U.S. 167 (1959); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4242, at 465 (1978) ("it is clear that there is no rule to this effect")), and overlooks the fact that Trustees too have raised a claim protected by the Fourteenth Amendment.

[51] *See Kolender* v. *Lawson*, 103 S. Ct. 1855, 1857 n.3 (1983); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977); *Sosna* v. *Iowa*, 419 U.S. 393, 396-397 n.3 (1975).

even the most exacting tests for waiver—either "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)) or a "deliberate bypass" of the opportunity to litigate a matter in state court. *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). Therefore, HHA may not raise this issue for the first time in this Court. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (*per curiam*).[84]

Furthermore, HHA affirmatively argued below that *Younger* was *inapplicable* and asked both the District Court and the Court of Appeals to reach the merits of Trustees' federal claims (JA 99-100, 115-116, and 131-135).[85] HHA may not take a contrary position now. This Court has consistently refused to sanction a Janus-faced approach by the government of lulling the lower federal courts into believing that a potentially dispositive threshold question was not properly before them, only to turn around and present the contrary argument for the first

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[84] Portlock is also a latter-day standard bearer in this respect. Portlock did not raise *any* abstention argument in its answer, any pleading it filed with the District Court, or its initial brief with the Court of Appeals (JA 68-73, 89-90, 96-98, 110-111). (In the initial stages of this suit, Portlock lessees were represented by the same counsel as the Wai-Kahala Tract H *et al.* intervenors.) Thereafter, Portlock only claimed that *Younger* was applicable in a supplemental post-oral argument memorandum. At no time did Portlock claim that any other abstention doctrine was apposite.

[85] Indeed, HHA's about-face strategy has continued even in this Court. For instance, in its Jurisdictional Statement HHA conceded that there were no ongoing state judicial proceedings pending at the time Trustees filed their complaint in the District Court, and observed that this fact distinguished this case from *Ahrensfeld* v. *Stephens*, 528 F.2d 193 (7th Cir. 1975), in which the Circuit Court held that *Younger* was applicable to ongoing, state-initiated condemnation suits (HHA JS 26). In its brief on the merits, however, HHA has argued that there were ongoing state court proceedings at the time Trustees filed their complaint (HHA Br. 42-43). While that assertion is incorrect as a matter of fact and law, it does typify HHA's quite recent approach to abstention.

time to this Court.[86] Certainly, Congress could not have intended to subject plaintiffs, or the federal courts, to any such gambol; indeed, Congress adopted 42 U.S.C. § 1983, upon which Trustees have relied (JA 46), precisely to ensure that the federal courts could protect persons against state machinations of this kind (*see* note 71, *supra*). Accordingly, there is no reason to permit HHA to toy with Trustees or the courts below in that fashion. A ruling for appellants on this issue would be an open invitation to future litigants to reserve all abstention arguments until after an adverse result in the Court of Appeals and then raise abstention for the first time in petitions for rehearing or in this Court. For this reason as well, HHA should not be permitted to shift positions, as if dancing a quadrille, to invoke *Younger* now.[87]

There is also no good reason to relieve HHA from its waiver. In light of the state's oft-acknowledged concern (*see* note 108, *infra*) that Chapter 516 would be challenged under the Eminent Domain Clause Public Use requirement (as the state itself once did, *see* note 51, *supra*), HHA was well aware that an aggrieved party would raise this claim in federal courts.[88] In fact, HHA has conceded that it knew, before this suit was filed, that Trustees would do so (HHA Br. 10; HHA JS 7). Nonetheless, the only abstention doctrine HHA even briefly raised in either court below was *Pullman*; HHA never argued that *Younger* was applicable.

We submit that the states, and their agencies, such as HHA, have an affirmative duty at the outset of litigation

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[86] *E.g.*, *Steagald* v. *United States*, 451 U.S. 204, 208-211 & n.5 (1981); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

[87] In fact, because HHA argued to the Court of Appeals that abstention was inappropriate on any ground (JA 131-137), HHA also may not now contend that abstention is appropriate under *Burford*, *Pullman*, or *Colorado River*.

[88] It also cannot be said that HHA or the state "lacked the tools to construct their [*Younger*] claim." *Engle* v. *Isaac*, 456 U.S. 107, 133 (1982) (footnote omitted). By the time Trustees filed suit, *Younger* was eight years old. *Cf.* 456 U.S. at 131-133.

to evaluate and determine the state's interests in this respect. If these interests compel decision by the state courts, the state has an obligation to assert its *Younger* claim at the first opportunity, so that the question of abstention can be decided before the entire federal judicial apparatus is set in motion on the merits. Permitting the state to withhold a *Younger* claim until after an unfavorable ruling on the merits would entail unjustified institutional costs.[89] That is particularly true where the state withholds reliance upon *Younger* until seeking review in this Court. *Younger* does not support that result.

In a parallel context, the Court has refused to permit the state to protect final judgments in criminal cases by invoking *Wainwright* v. *Sykes* for the first time in this Court. *See, e.g., Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). The state interests underlying *Sykes* are at least equal to, if not greater than, those underlying *Younger*. *Compare Engle* v. *Isaac*, 456 U.S. at 126-129, *and Sykes*, 433 U.S. at 89-91, *with Younger*, 401 U.S. at 43-49.[90] In other parallel contexts, the Court has followed the same

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[89] In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the Court recognized that forcing a state criminal defendant to assert his federal claims at trial served a variety of institutional interests: it contributed to the accuracy and finality of judgments, prevented a party from "sandbagging" a state trial court by withholding a potentially dispositive matter until after an adverse judgment, conserved scarce judicial resources, and promoted respect for state court judgments entered after a trial on the merits. 433 U.S. at 88-91. Those considerations are fully applicable in this parallel context.

[90] The interference with the state's surpassing interest in enforcing its criminal laws, the displacement of the state court criminal process, the elimination of finality of criminal judgments, and the freeing of clearly guilty but unretriable prisoners (*see, e.g., Engle* v. *Isaac*, 456 U.S. at 126-129 & nn.31-34) all suggest that the state has a greater interest in preserving *successful* judgments in *criminal* cases than in voiding *adverse* judgments in *civil* cases.

approach.[91] Requiring HHA to invoke *Younger* in the lower federal courts is entirely appropriate.

2. The considerations which led this Court to rule that an amicus curiae should not be permitted to invoke *Younger* against the state's wishes (*Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. at 480) also justify a rule denying private parties the right to invoke *Younger* abstention over the state's decision to litigate a case in federal court. The essence of the *Younger* doctrine and the ancillary rule that the state may waive that doctrine is a recognition that the state rather than a private party is entitled to choose the forum in which to litigate the constitutionality of its laws. HHA elected to litigate this case on the merits in federal court, and none of the intervenors should now be permitted to undermine that decision.

3. Waiver problems notwithstanding, the facts here clearly militate against *Younger* abstention.

(a) The Court of Appeals found (HHA JS App. A4-A6 n.1) that there were no ongoing state judicial proceedings at the time this suit was filed.[92] That finding

[91] For example, the Court has noted that "[t]o some extent, the practical considerations supporting" the *Younger* doctrine "are similar to those that underlie the requirement of exhaustion of administrative remedies." *Schlesinger* v. *Councilman*, 420 U.S. 738, 756 (1975). And it is hornbook law that the government's failure to assert that claim will be treated as a waiver. *See, e.g., Mathews* v. *Diaz*, 426 U.S. 67, 75-77 (1976).

The Court has also drawn a parallel between the comity interests underlying *Younger* and those underlying the rule that a state prisoner must exhaust state judicial remedies before applying for federal habeas corpus. *Preiser* v. *Rodriguez*, 411 U.S. 475, 491 (1973). Several Circuit Courts have ruled that the state's failure to contest a prisoner's exhaustion constitutes a waiver of that claim. *Lamb* v. *Jernigan*, 683 F.2d 1332, 1335 n.1 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1276 (1983); *Hopkins* v. *Jarvis*, 648 F.2d 981, 983 n.2 (5th Cir. 1981); *Brown* v. *Fogel*, 387 F.2d 692, 695 (4th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968).

[92] That factual conclusion is also a complete answer to appellants' argument that the Court ought to adopt the holding in *Ahrensfeld* v. *Stephens*, *supra* (state court condemnation proceedings pending at the time the plaintiff filed suit in federal court.)

was plainly correct: Trustees filed this suit on February 28, 1979, and HHA did not file its first suit to condemn Trustees' property until September 21, 1979, almost seven months later (note 68, *supra*).[93] *Younger* therefore did not bar this suit. *Zablocki* v. *Redhail*, 434 U.S. at 379-380 n.5; *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974).[94]

HHA argues that the targeting[95] of Trustees' lots for mandatory arbitration proceedings at the time Trustees filed suit is sufficient to trigger *Younger* abstention (HHA Br. 44-45). That argument overlooks Section 516-51(b) of Chapter 516 (1976 repl.) which, at all pertinent times, expressly provided that "mandatory arbitration shall be in advance of and shall not constitute any part of any action in condemnation or eminent domain" (page 15, *supra*).[96] Under state law, these proceedings are neither themselves, nor part of, a judicial proceeding, and

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[93] HHA expressly acknowledged in the Court of Appeals that "no state proceeding under the disputed statute involving the Trustees and HHA was pending at the time of the filing of Trustees action * * *" (JS 133).

[94] If this Court were to take seriously HHA's argument that state court condemnation proceedings are simply "the final stage of the state's legislative process" (HHA Br. 40), then no state court condemnation suit could *ever* trigger *Younger*, because that doctrine is limited to "state judicial proceedings * * *." *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 112-113 (1981).

[95] HHA confuses "designation" of lots for acquisition, which for Tract H did not occur until September 21, 1979, well after the filing of the federal complaint, with the preliminary (and rote) determination of effectuation of public use, a condition precedent to designation. *See* Haw. Rev. Stat. § 516-22 and pp. 8-10, *supra*. In any event, Judge Poole's conclusion (HHA JS App. A28-A29 n.5) that "the public hearings before the Hawaii Housing Authority bear none of the attributes of a judicial proceeding such as that found in *Middlesex*" is entitled to substantial deference (*cf. Bishop* v. *Wood*, 426 U.S. 341, 346 (1976)) and is clearly correct.

[96] Because Section 516-51(b) is clear on its face, HHA's suggestion (HHA Br. 45) that *Pullman* abstention is appropriate in this respect must fail for the reasons given above (pp. 25-29) regarding *Pullman* abstention.

therefore do not engage *Younger*. *See Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 433 (1982); *McNary*, 454 U.S. at 112-113.[97]

Furthermore, *Younger* contemplates that the state proceeding to which abstention would apply is both a constitutional and competent forum for adjudication of a party's federal claims. *See Middlesex*, 457 U.S. at 432; *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973). The District Court's invalidation of these mandatory arbitration proceedings as an unconstitutional taking of Trustees' property without just compensation (JA 106-108)—a judgment which HHA did not appeal—demonstrates that these administrative proceedings do not satisfy the first criteria. Moreover, HHA also lacked the authority to adjudicate Trustees' constitutional claims. Chapter 516, in this respect, simply provides HHA[98] with the statutory authority to exercise the state's eminent domain power under other provisions of Hawaii law.[99] Those other provisions, in turn, expressly provide that any question of public use shall be decided by the courts.[100] Hence,

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[97] HHA's reading of *Middlesex* is in error. While *Middlesex* acknowledged that the "civil," "criminal," or "quasi-criminal" label attached to the proceeding in question is not dispositive (457 U.S. at 433 n.12), the Court made clear that the state law characterization of the proceeding as "judicial" or not *was* dispositive. *Id.* at 432-434. *Middlesex* ruled that New Jersey state bar disciplinary proceedings were judicial because, under state law, "filing a complaint with the local Ethics and Grievance Committee 'is in effect a filing with the [state] Supreme Court * * *.'" *Id.* at 433 (quoting *Toft* v. *Ketchum*, 18 N.J. 280, 284, 113 A.2d 671, 674, *cert. denied*, 350 U.S. 887 (1955)). Here, state law clearly provides that mandatory arbitration proceedings are not judicial. Designation is therefore akin to the extrajudicial process that the Court found insufficient to trigger *Younger* in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 3 & n.1 (1974), and *Fuentes* v. *Shevin*, 407 U.S. 61, 71 & n.3 (1972).

[98] Haw. Rev. Stat. §§ 356-18 and 516-23.

[99] Found at Haw. Rev. Stat. Chapter 101.

[100] Haw. Rev. Stat. § 101-34. In fact, Chapter 516 originally gave the Hawaii Supreme Court original jurisdiction over all constitu-

state law clearly establishes that these mandatory arbitration proceedings also fail the second prerequisite for *Younger*.

(b) There still were no ongoing state judicial proceedings at the time the District Court granted Trustees a temporary restraining order and, even later, a preliminary injunction restraining the mandatory arbitration and valuation components of Chapter 516.[101] That injunction afforded Trustees substantial relief on the merits of their complaint. It eliminated forced participation in and payment for mandatory arbitration, which could have fixed, well in advance of the actual taking, the compensation Trustees would ultimately receive. That ruling also eliminated exclusive use of valuation formulae which would have given Trustees less than fair market value for their property. By that point, "proceedings of substance on the merits ha[d] taken place in the federal court." *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). *See Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975) (*Younger* inapplicable where District Court had issued a TRO prior to any state court proceedings).[102]

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tional challenges to the Act (note 51, *supra*). When this provision was repealed in 1975, the legislature did not substitute HHA for the Hawaii courts.

In this respect, Hawaii law parallels federal law, under which federal administrative agencies lack authority to adjudicate federal constitutional claims. *See Johnson* v. *Robinson*, 415 U.S. 361, 368 (1974); *Public Util. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958); K. Davis, *Administrative Law Treatise* § 26.6, at 434-435 (2d ed. 1983).

[101] HHA JS App. A2-A4 n.1; *id.* at A30 (Poole, J.); *id.* at A101-A104; *see* JA 14.

[102] HHA, again, acknowledged this fact before the Court of Appeals: "no such state proceeding [under the disputed statute involving Trustees and HHA] was commenced before proceedings of substance on the merit [sic] took place in the District Court below" (JA 133).

HHA's current argument that these proceedings do not qualify under *Hicks* (HHA Br. 43) fails to appreciate the context of the Court's ruling in that case. By the time theatre owners filed their

Therefore, *Younger* was no bar to this suit, because actions subsequently filed in state court do not oust the federal courts of jurisdiction under *Younger*. *See, e.g., Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977).

II. THE COURT OF APPEALS CORRECTLY RULED THAT CHAPTER 516 VIOLATED THE PUBLIC USE REQUIREMENT OF THE EMINENT DOMAIN CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

As relevant here, the Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken *for public use*, without just compensation." The issue at the heart of this case involves the meaning of the Public Use requirement of the above clauses,[103] and the extent to which that requirement limits

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federal suit, two theater employees had been criminally charged because of allegedly obscene films, and a state trial court had declared the films to be obscene and ordered them seized. The Court found that "[the plaintiffs] had a substantial stake in the state proceedings," and, "[o]bviously, their interests and those of their employees were intertwined"; plaintiffs' lawyers even represented their employees in the state court suit. 422 U.S. at 348-349. The Court ruled that *Younger* barred the federal suit because it would have interfered with the ongoing state proceeding in which plaintiffs had as much an interest as the defendants and were, realistically speaking, parties themselves. In other words, because the federal plaintiffs were essentially already parties to that state proceeding, their federal suit was filed second, not first. Highlighting that posture was the fact that the federal plaintiffs were charged in state court the day after they served their federal complaint, "prior to [the defendants'] answering the federal case and prior to any proceedings whatsoever before the three-judge court." *Id.* at 350.

In that context, the Court ruled that it would "trivialize" *Younger* to treat plaintiffs' successful race to the courthouse as eliminating *Younger*. The facts here are materially different (*see* pp. 15-18, *supra*).

[103] The Public Use requirement is part of the Eminent Domain Clause of the Fifth Amendment, and is applicable to the states

legislative power. In that regard, it is important to recognize at the outset four indisputable propositions that must necessarily guide the Court's analysis.

First, it cannot be denied that the Founding Fathers must have intended the Public Use requirement to play some role in federal constitutional law.[104] *Second*, it must be true that the Public Use requirement imposes some limit on governmental power.[105] *Third*, it must also be true that the Public Use requirement limits the government's authority to effect a "taking," rather than limiting the guarantee of "just compensation" for whatever takings are lawful.[106] *Fourth*, the text of the Public Use

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through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897).

Hereafter, we shall use the term "Eminent Domain Clause" to refer to the entire Clause, "Public Use requirement" to refer only to the italicized portion, "Taking provision" to refer to the first portion of the Eminent Domain Clause, and "Just Compensation requirement" to refer to the last portion of that Clause.

[104] Because "it is a constitution we are expounding" (*McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)), which "states or ought to state not rules for the passing hour, but principles for an expanding future" (B. Cardozo, *The Nature of the Judicial Process* 83 (1921); *see, e.g.*, *Weems* v. *United States*, 217 U.S. 349, 378 (1910)), "[i]t cannot be presumed that any clause in the constitution is intended to be without effect * * *." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 150 (1803). Any interpretation of the Public Use requirement which, as a legal or practical matter, treats the requirement as if it has no effect must therefore be rejected. Hence, we can safely put to one side HHA's suggestion (HHA Br. 34) that the Public Use requirement states nothing more than kind advice.

[105] The fundamental purpose of the Bill of Rights was to place certain principles that the Founders believed were necessary to a free society beyond the reach of the majoritarian political process. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 579 (1980) (plurality opinion of Burger, C.J.). The Public Use requirement, by its very existence, is manifestly one of those rights.

[106] It is inconceivable that the Public Use requirement instead limits the Just Compensation requirement, and thereby guarantees just compensation in only those instances in which a taking is for a

requirement necessarily denies the government the authority to condemn one person's private property for the purely private use and benefit of another.[107]

If the Court accepts those propositions, then the condemnations authorized by Chapter 516 must be held unconstitutional as serving only the private use and benefit of the lessees. That statute, without historical precedent or contemporary analogue, employs the state's power of eminent domain—a power once described as "despotic" and unjustified "except in urgent cases, or cases of the first necessity" (*Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795) (Patterson, J., seriatim opinion))—for no reason other than to take Trustees' reversionary interest in leaseholds for transfer to lessees who themselves apply and pay for that interest. Indeed, the condemnations authorized by Chapter 516 constitute what must be the paradigm of a purely private transfer of one party's private property for the exclusive use and benefit of another private party.[108]

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public, rather than private, use. That interpretation would render the Just Compensation requirement virtually worthless, transform the government's condemnation authority into little more than a weapon of arbitrary oppression, and nullify the purpose of the Eminent Domain Clause of assuring that no person is forced to bear the entire brunt of governmental condemnations. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also* Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365.

[107] Any other interpretation of the constitutional text is flatly inconsistent with the Drafters' express use of the term "public" to describe the types of uses recognized as constitutionally valid. As Chief Justice John Marshall once put it, "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

[108] Even HHA has admitted the novelty of Chapter 516 as an effort to accomplish supposed land use reform, stating that "[t]here were and are no clear-cut precedents in American law to define the

Appellants' defense of this transfer rests on the proposition that the Public Use requirement merely obliges the legislature to engage in a utilitarian calculus, at whatever level of abstraction the legislature may choose, that is not subject to judicial oversight.[109] Under appellants' theory, no condemnation is ever per se forbidden—even one avowedly done simply to make *B* happier by giving him *A*'s property—and the redistribution of property from *A* (who has more) to *B* (who has less) for that reason alone is *itself* a legitimate "public use."

The rule appellants espouse would effectively excise the Public Use requirement from the text of the Constitution. A legislature bent on condemning a party's property can always conclude that doing so will augment the public weal. And that, of course, is particularly true where, as here, the legislature specifically intends to take one party's property to satisfy the desires of a numerically-larger and, hence, politically-more-powerful, group of citizens. In short, the basic constitutional issue presented by these appeals is whether the Public Use requirement is merely precatory so that a state's taking of private property is uninhibited by that provision and unreviewable in the courts.

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specific rights of the respective parties." Hawaii Housing Authority, *1975-1976 Annual Report* 9 (1977). *See also A Report to the Governor and the State Legislature of Hawaii, Management Audit of the Leasehold to Fee Conversion Program of the Hawaii Housing Authority*, No. 82-4, at 9 (Feb. 1982):

> At the time of the initial enactment of the land reform law, it was recognized that the law raised serious constitutional issues: (1) whether the taking authorized by the law constituted taking for a "public use," and (2) whether that provision of the law making it applicable to leases existing at the time of the enactment of the law constituted an "impairment of the obligation of contracts."

[109] Indeed, our characterization of appellants' argument may be overly generous, since the logical import of HHA's argument is that the Public Use requirement serves no purpose (HHA Br. 30) and offers no protection against condemnation (HHA Br. 34).

B. The Public Use Requirement Forbids the State from Transfering Property from One Private Party to Another for the Exclusive Use and Benefit of the Latter.

The Court of Appeals ruled that the Public Use requirement forbade the state from using its condemnation power simply to transfer fee simple title from one private party to another for the latter's private use and benefit. That ruling correctly expresses the core purpose of the Public Use requirement and should be affirmed. A number of considerations strongly support the judgment below.

1. The Court of Appeals properly began its analysis by referring to the common law origins of the eminent domain power (HHA JS App. A5-A10). History discloses that the preservation of private property was of unquestionable importance to the authors of the Constitution and the Bill of Rights.[110] The idea that the protection of property interests was central to, if not the sole function of, government was expressed in both scholarly literature[111] and on the floor of the Convention of

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[110] B. Schwartz, *A Commentary on the Constitution of the United States: Part II, The Rights of Property* 18-22 (1965), and *Part III, the Rights of the Person* 8 (1968); Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 Vand. L. Rev. 681, 682-83 (1974). John Adams expressed the view that "property must be secured or liberty cannot exist" (P. Freund, *The Supreme Court in the United States* 35 (1961)), and James Madison observed that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals." *The Federalist* No. 54 at 370 (J. Cooke ed. 1961).

[111] John Locke, whose writings provided "the accepted theory of government in America when the American doctrine of eminent domain was being hammered out" (Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 586 (1972)), considered protection of property to be a core social value: "For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property * * *." J. Locke, *An Essay Concerning Civil Government*, in J. Locke, *Two Treatises of Government*, 378-80 (P. Laslett ed. 1960); *see also The Federalist* No. 10, at 104-09 (J. Madison) (Hamilton ed. 1968).

1787 [112] as a vital check on the legislature's power to infringe fundamental private property rights.[113] The Founding Fathers, who were well versed in the doctrine of their day,[114] knew that unless some absolute limits were imposed upon the awesome power of majoritarian rule,[115] the basic rights only recently secured would fall prey to the same arbitrary despotism from which the colonists had, at great cost, broken free. In that respect, the Founding Fathers' firm belief that ownership of private property was a special aspect of our recently-won freedom confirms that a taking of private property for private use was never understood to be a legitimate exercise of the sovereign's power. Because the threat to property rights was believed to be particularly real,[116] the

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[112] I M. Farrand, *Records of the Federal Convention of 1787*, at 434, 533-34, 541-42 (1927), and II M. Farrand, *supra*, at 123.

[113] Stoebuck, *supra*, 47 Wash. L. Rev. at 593-595; B. Schwartz, *supra*, *Part II*.

[114] *See* B. Schwartz, *supra*, *Part II*, at 27-29 (1965); Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in 5 *Perspectives in Am. Hist.* 327, 362 (B. Bailyn & D. Flemming eds. 1971).

[115] *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1778), reprinted in 5 *The Writings of James Madison* at 272: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."

[116] As James Madison informed the Convention, "[i]n future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] * * * combine under the influence of their common situation; in which case the rights of property & the public liberty, [will be endangered] * * *." II M. Farrand, *supra*, 203-204. *See also* Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), reprinted in 5 *The Writings of James Madison* at 29; *The Federalist* No. 10, at 104-109 (J. Madison); *id.* No. 70, at 522 (A. Hamilton).

Public Use limitation was one of the three [117] especially important protections considered by the Convention.[118]

The Framers' concern for the preservation of property rights, coupled with their intent to fashion a government of limited powers, demonstrate that the Public Use restriction was designed to prevent taking property from *A* for the wholly private use of *B*.[119] The impropriety of such private takings was acknowledged in ancient Rome,[120] asserted as dogma by civil and common law philosophers such as Pufendorf,[121] Burlamaqui,[122] de Vat-

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[117] Another, obviously, was the Just Compensation requirement. A third, considered but not adopted, would have apportioned political power as well as the franchise on the basis of wealth or property. *See* I. M. Farrand, *supra*, at 533 (remarks of Gov. Morris of Pennsylvania); *id.* at 541 (remarks of Mr. King of Massachusetts); *id.* at 542 (remarks of Mr. Butler of South Carolina). The Framers apparently did not believe that, at a time when each state permitted only freeholders to vote and hold office, and when Senators were chosen by state legislatures, the omission of this requirement would endanger property rights.

[118] Stoebuck, *supra*, 47 Wash. L. Rev. at 593.

[119] *See, e.g.*, Stoebuck, *supra*, 47 Wash. L. Rev. at 595; B. Schwartz, *supra*, *Part II*, at 18-22, 240-241 (1977); Comment, *Rex Non Protest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 Dick L. Rev. 266, 280-281 (1972).

[120] Although practice under Roman law varied, it is clear that expropriation of private property was limited to certain well recognized classes of public works and depended upon the urgency of the public need. Jones, *Expropriation in Roman Law*, 45 Law Q. Rev. 512, 521, 525 (1929). Some evidence suggests that expropriation of private property could not be compelled under Roman law even in the public interest. *Id.* at 521 n.30.

[121] S. Pufendorf, *On the Laws of Nature and Nations* 1070 (Oldfather & Oldfather trans. 1964).

[122] 2 J. Burlamaqui, *The Principles of Natural and Political Law* 45-47 (5th ed. T. Nugent trans. 1807).

tel,[123] Rutherforth [124] and Blackstone,[125] and even found expression in contemporary state constitutions.[126] The explicit constitutional protection given individual property rights by our Founding Fathers in the text of the Public Use requirement, in both its original [127] and final

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[123] E. de Vattel, *The Law of Nations* 19 (C. Fenwick trans. 1916).

[124] T. Rutherforth, *Institutes of Natural Law* 399, 453-54 (2d American ed. 1832).

[125] 1 W. Blackstone, *Commentaries* 139 (T. Cooley ed. 1884). The early jurisprudential writers had considerable prestige and influence among American colonists (Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 860 (1978)), and believed that the power of eminent domain should be more restricted than other governmental powers such as the police power. Stoebuck, *supra*, 47 Wash. L. Rev. at 589, 595. While their terminology varied, none envisioned purely private takings as a legitimate exercise of the state's eminent domain power. *Id.*, citing H. Grotius, *De Jure Belli ac Pacis* 385 (F. Kelsey trans. 1925); E. de Vattel, *The Law of Nations* 96 (C. Fenwick trans. 1916); S. Pufendorf, *De Jure Naturae et Gentium* 1285 (C. and W. Oldfather trans. 1934); C. van Bynkershoek, *Quaestionum Juris Publici* 218 (T. Frank trans. 1930). Blackstone—cited by the Founding Fathers as often as any other source (C. Mullett, *Fundamental Law and the American Revolution 1760-1776* 78 (1966); C. Rossiter, *Seedtime of the Republic* 357-58 (1953))—would even later assert that private property could not be taken for public use under *any* circumstances. *Commentaries* 139.

[126] The public use restriction first appeared in several of the state constitutions (*see, e.g.*, Pa. Const., Declaration of Rights, art. VIII (1776), found in 5 F. Thorpe, *Federal and State Constitutions* 3080 (1909); Va. Const., Bill of Rights, Sec. 6 (1776), found in 7 F. Thorpe, *supra*, at 3813), and was variously defined in terms of "necessity" (Vt. Const., Ch. I, Art. II (1786), found in 6 F. Thorpe, *supra*, at 3752) and "public exigencies." 3 F. Thorpe, *supra*, at 1891. It is highly likely that the Framers relied upon this language and the civil law writers in adopting a standard which prohibited wholly private takings. Stoebuck, *supra*, 47 Wash. L. Rev. at 591-592.

[127] Madison's original version provided that "No person shall be * * * obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). The addition of the term

forms, reflects the principle that private takings of the type at issue here are wholly repugnant to our constitutional system.[128]

2. In light of that historical background, it is scarcely surprising that the Court has acknowledged virtually from its inception that "a law that takes *property* from A. and gives it to B. * * * is against all reason and justice * * * [and such power] cannot be presumed" to have been granted to the government. *Calder V. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) (emphasis in original). In the words of Justice Story for the Court:

> We know of no case, in which a legislative act to transfer property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been consistently resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced * * *. [*Wilkinson* v. *Leland*, 27 U.S. (2 Pet.) 627, 658 (1829).]

The Court applied that principle in *Missouri Pacific R.R. Co.* v. *Nebraska*, 164 U.S. 403, 417 (1896), ruling that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment * * *." This consensus was so firmly established that the Court could unequivocably state in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 251-252:

> There ought not to be any dispute, at this day, in reference to the principle which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American ju-

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"private" and the retention of the "public use" phrase actually strengthened the concept in the original version that takings must, indeed, be for a public use.

[128] *See, e.g.*, Corwin, *The Basic Doctrine of American Constitutional Law*, 22 Mich. L. Rev. 247, 264 (1914); Comment, *supra*, 76 Dick L. Rev. at 280-281.

> risprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments.

The Court, for most of its history, has consistently reaffirmed the principle once acknowledged for the Court by Justice Brandeis that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937). *See, e.g., United States* v. *Carmack*, 329 U.S. 230, 239 (1946); *Cincinnati* v. *Vester*, 281 U.S. 439, 447 (1930); *Brown* v. *United States*, 263 U.S. 78, 84 (1923); *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 159 (1896); *Cole* v. *LaGrange*, 113 U.S. 1, 7 (1885); *Parkersburg* v. *Brown*, 106 U.S. 487, 501 (1883); *Loan Ass'n* v. *Topeka*, 87 U.S. (20 Wall.) 655, 663 (1875); *Olcott* v. *Supervisors*, 83 U.S. (16 Wall.) 678, 689 (1873); *Mills* v. *St. Clair*, 49 U.S. (8 How.) 569 (1850).[129]

This limit on the government's condemnation power reflects the Framers' concern with protecting private property. The Court long ago recognized that "in any

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[129] That principle is also implicit in the Court's inquiries as to whether a particular taking served a legitimate public use. That inquiry would have been unnecessary if any particular category of takings or individual condemnations were inevitably legitimate. In each case, the Court's decision plainly assumes that the simple transfer of property from *A* to *B* is forbidden. *See, e.g., United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946); *Old Dominion Land Co.* v. *United States*, 269 U.S. 55 (1925); *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. 710 (1923); *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700 (1923); *Block* v. *Hirsch*, 256 U.S. 135 (1921)); *Sears* v. *City of Akron*, 246 U.S. 242 (1918); *O'Neill* v. *Leamer*, 239 U.S. 244 (1915); *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598 (1908); *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906); *Clark* v. *Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation District* v. *Bradley*, *supra*; *Shoemaker* v. *United States*, 147 U.S. 282 (1893).

society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government" (*Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324 (1893)), and are "vital principle[s] of republican institutions." *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. at 235-236. The Court has reiterated that principle on more than one occasion (*see, e.g., Olson* v. *United States*, 292 U.S. 246, 254 (1934)) and, more recently, has rejected the artificial distinction between "personal liberties" and "property rights." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972).[130]

The principle also finds expression in the Court's Takings and Just Compensation decisions, which have always presumed that takings can only be for a public use. Hence, regulations that "adjust the benefits and burdens of economic life to promote the common good" (*Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979)), and thereby "secure an average reciprocity of advantage" offsetting the burden suffered by any one person (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)), will not be deemed takings. Similarly, the purpose of the Just Compensation requirement is to redistribute the cost of a taking from an aggrieved party to the public at large (*see, e.g., Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. at 163; *Armstrong* v. *United States*, 364 U.S. at 49), which will necessarily be benefitted in every case

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[130] The Court's statement of that principle in *Lynch* merits reiteration:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [405 U.S. at 552 (citations omitted).]

from a condemnation done for a public use. Because a taking may only be done for such a use, "any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated" may be excluded from the computation. *Monongahela Navigation Co.* v. *United States*, 148 U.S. at 326. *See also Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949).

3. This Court has not stood alone in that regard. Every state, either by express constitutional provision [131] or by judicial interpretation,[132] imposes a public use limitation on the exercise of eminent domain. The Court's conclusion that the state may not employ its eminent domain power simply to transfer private property from *A* to *B*, or for any other wholly private purpose, has also been applied by the state courts in numerous rulings invalidating purely private condemnations from the earliest days of our jurisprudence [133] to more recent

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[131] Ala. Const. art. I, § 23; Alaska Const. art. I, § 18; Ariz. Const. art. II, § 17; Ark. Const. art. II, § 22; Cal. Const. art. I, § 19; Colo. Const. art. II, §§ 14 and 15; Conn. Const. art. I, § 11; Del. Const. art. I, § 8; Fla. Const. art. X, § 6; Ga. Const. art. I, § 3 ¶ 1; Hawaii Const. art. I, § 20; Idaho Const. art. I, § 14; Ill. Const. art. I, § 15; Ind. Const. amend. V; Iowa Const. art. I, § 18; Kans. Const. art. XII, § 4; Ky. Const. § 13; La. Const. art. I, § 4; Me. Const. art. I, § 21; Md. Const. art. III, § 40; Mass. Const. Part 1, art. X; Mich. Const. art. 10, § 2; Minn. Const. art. 1, § 13; Miss. Const. art. 3, § 17; Mo. Const. art. I, § 26; Mont. Const. art. II, § 29; Neb. Const. art. I, § 21; Nev. Const. art. VIII, § 7; N.H. Const. Part 1, art. 12; N.J. Const. art. 1, ¶ 20; N.M. Const. art. II, § 20; N.Y. Const. art. 1, § 7; N.D. Const. art. 1, § 16; Ohio Const. art. 1, § 19; Okla. Const. art. 2, § 23; Or. Const. art. I, § 18; Pa. Const. art. 1, § 10; R.I. Const. art. 1, § 16; S.C. Const. art. I, § 13; S.D. Const. art. VI, § 13; Tenn. Const. art. 1, § 21; Tex. Const. art. 1, § 17; Utah Const. art. I, § 22; Vt. Const. Ch. I, art. 2; Va. Const. art. I, § 11; Wash. Const. art. 1, § 16; W. Va. Const. art. 3, § 9; Wis. Const. art. 11, § 2; Wyo. Const. art. 1, § 32.

[132] *Gray* v. *City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932); *Hines* v. *City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913).

[133] *See, e.g., Taylor* v. *Porter & Ford*, 4 Hill. 140, 145 (N.Y. 1843) ("[i]f there was not one word of qualification in the whole

times.[134] These decisions, rendered both before and after Justice Douglas' decision in *Berman* v. *Parker*, 348 U.S. 26 (1954),[135] have reaffirmed the Framers' belief that

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instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B."); *Bloodgood* v. *Mohawk & H.R.R.*, 18 Wend. 9, 54 (N.Y. Ct. Corr. of Err. 1837) (Tracy, J. concurring) ("[i]t has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded about fixed laws, however despotic the form of government might be, to take the property of one individual or subject, and bestow it upon another. The possession and exertion of such a power would be incompatible with the nature and object of all government * * *. [I]t follows necessarily that the rightful exertion of a power by the government of taking arbitrarily from any man what is his own, for the purpose of giving it to another, would subvert the foundation principle upon which the government was organized, and resolve the political community into its original chaotic elements").

[134] *Baycol, Inc.* v. *Downtown Development Authority of Fort Lauderdale*, 315 So.2d 451, 455 (Fla. 1975) ("[w]e have been long committed in a consistent series of cases to the proposition that eminent domain cannot be employed to take private property for predominantly *private* use * * *"); *City of Atlanta* v. *Atlanta Gas Light Co.*, 144 Ga. App. 157, 240 S.E.2d 730, 731 (1977) ("[b]ut the power of eminent domain may never be used to acquire property to be used by private individuals solely for private use and private gain"); *City of Owensboro* v. *McCormick*, 581 S.W.2d 3, 5 (Ky. 1978) ("[n]aked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections * * *").

[135] For pre-*Berman* cases, *see, e.g.*, *Pittsburgh, W. & K. Railroads Co.* v. *Benwood Iron-Works*, 31 W. Va. 710, 8 S.E. 453 (1888); *Shizas* v. *City of Detroit*, 333 Mich. 4[illegible]52 N.W.2d 589 (1952); *Cozad* v. *Kanawha Hardwood Co.*, 139 N.C. 283, 51 S.E. 932 (1905); *Boyd* v. *Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273 (1916); *Albright* v. *Sussex County Lake & Park Commission*, 71 N.J.L. 303, 57 A. 398 (1904); *In Re Opinion of the Justices*, 204 Mass. 607, 91 N.E. 405 (1910); *City of Gary* v. *Much*, 94 N.E. 583 (Ind. 1911); *Connecticut College for Women* v. *Calvert*, 87 Conn. 421, 88 A. 633

"[t]he power of eminent domain * * * is not a personal privilege" but "is a special authority impressed with a public character and to be utilized for a public end." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280 (1943). Distinguished state jurists [136] and commentators [137] have also agreed that the state may not simply

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(1913); *In Re Split Rock Cable-Road Co.*, 128 N.Y. 408, 416, 28 N.E. 506 (1891); *In Re Niagara Falls & W. Ry. Co.*, 108 N.Y. 375, 15 N.E. 429 (1888); *Threlkeld* v. *Third Judicial District Court*, 36 N.M. 350, 15 P.2d 671 (1932); *Neitzel* v. *Spokane International Ry. Co.*, 65 Wash. 100, 117 P. 864 (1911); *Reed* v. *City of Seattle*, 124 Wash. 185, 213 P. 923 (1923); *Howard Mills Co.* v. *Schwartz Lumber & Coal Co.*, 77 Kans. 599, 95 P. 559 (1908); *Gravelly Ford Canal Co.* v. *Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918); *Anderson* v. *Smith-Powers Logging Co.*, 71 Or. 276, 139 P. 736 (1914); *Memphis Freight Co.* v. *Mayor & Alderman of Memphis*, 4 Coldwell 4 (Tenn. 1867); *In Re Deansville Cemetery Ass'n*, 66 N.Y. 569 (1876); *In Re Application of Eureka Basin Warehouse and Mfg. Co.*, 96 N.Y. 42 (1884).

For post-*Berman* cases, *see, e.g.*, *Edens* v. *City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956); *Karesh* v. *City Council of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978); *City of Little Rock* v. *Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967); *Phillips* v. *Foster*, 215 Va. 543, 211 S.E.2d 93 (1975); *Redee Inlet Authority* v. *Bastian*, 206 Va. 906, 147 S.E.2d 131 (1966); *In Re City of Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981); *Earth Management, Inc.* v. *Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981); *In Re Opinion of the Justices*, 332 Mass. 769, 126 N.E.2d 795 (1955); *Opinion of the Justices*, 152 Me. 440, 131 A.2d 904 (1957); *City and County of San Francisco* v. *Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955); *State* v. *Bank of California*, 5 Wash. App. 861, 491 P.2d 697 (1971); *Arkansas State Highway Comm'n* v. *Alcott*, 260 Ark. 225, 539 S.W.2d 432 (1976).

[136] *See, e.g.*, Chancellor Kent's opinion in *Gardner* v. *Village of Newburgh*, 2 Johns ch. 162 (N.Y. 1816); 2 T. Cooley, *Constitutional Limitations* 1124-41 (8th ed. 1927).

[137] Whether the test is stated as public-use or public purpose, there is one thing about which American courts have always said they were adamant. *Eminent domain cannot be used to transfer property from one private person to another.* That would violate the most fundamental Lockean principle that governments were instituted to protect every man's

transfer property from *A* to *B* by eminent domain. This consensus both demonstrates that this principle has always been an enduring tenet of takings jurisprudence and refutes any suggestion that application of the principle to this case will irreparably disrupt local land-use planning efforts.

C. Chapter 516 Is an Unprecedented Attempt to Use Eminent Domain for Wholly Private Purposes.

1. The concept of "public use" has, of course, greatly expanded over time. It includes uses benefiting the public as well as by the public,[138] the justifying benefits may take a variety of forms,[139] and the government may implement a public use by using private enterprise so long as the public use is predominant and the private benefit is merely incidental.[140] But none of these expansions remotely covers Chapter 516. What the Hawaii legislature has attempted here is unprecedented. In no previous instance has a condemning authority successfully attempted a taking with the reach and sweep for private use of the one embodied in Chapter 516. Unless the Public Use requirement is to be read out of the Constitution,

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property against his neighbor's depredations. [Stoebuck, *supra*, 47 Wash. L. Rev. at 595 (emphasis added).]

See also Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67 (1931); 1 P. Nichols, *The Law of Eminent Domain* § 250, at 494-496 (2d ed. 1917); C. Randolph, *The Law of Eminent Domain* § 39, at 38 (1894); Rottschaefer, *Handbook of American Constitutional Law* 697-703 (1939); 2A J. Sackman & P. Rohan, *Nichols The Law of Eminent Domain* § 7.1 (rev. 3d ed. 1981 & Supp. 1982); 3 Willoughby, *The Constitutional Law of the United States* § 1224, at 1850-56 (2d ed. 1929); Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 409, 412-414 (1983); Comment, *supra*, 76 Dick. L. Rev. at 280-281.

[138] *See, e.g., Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916).

[139] *See, e.g., Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 707.

[140] *See, e.g., Berman, supra* (private parties involved in renovation of slums); *Hairston* v. *Danville & Western Ry. Co., supra* (railroad spurs for commerce).

it has been stretched beyond acceptable limits in this case.

Judge Poole pinpointed the central flaw in Chapter 516 when he noted that "the only variable presented is whether A or B holds title to the land * * *" (HHA JS App. A38). The Act neither provides for, requires, presupposes, nor envisions any change of any sort in the possession of the acquired leaseholds or the use to which they or their environs will be put. The condemnations authorized by the Act, furthermore, may take place only at the behest of the private beneficiaries thereof, who will pay for the condemnations themselves and who may be animated by nothing more than a naked desire to expropriate the lessor's title. The Act imposes no restrictions upon a lessee's right after acquiring the property, in turn, to lease his newly-acquired property, notwithstanding the state's professed interest in eliminating leaseholds on this land.

The instant case is indeed unprecedented. This Court is being asked to sanction a private taking that would have shocked the Founders, who viewed ownership of private property on a par with other fundamental rights, and surrounded by the same protections.[141] *Berman* v. *Parker* is the Court's most recent and most expansive public use decision; yet, as we show below, the facts of that case do not even come close to supporting what appellants seek to make of it here. *Berman* involved important public use factors that are nowhere to be found in this statute. And this case, in turn, involves a number of private-taking factors that are nowhere present in *Berman*. The Court could not simply apply *Berman* to this set of facts, but instead would have to extend the *Berman* holding, and even the *Berman* language, in a manner that finds no support in the case itself.

2. Just how far this case outdistances prior precedent is demonstrated by the following factors, all of which are

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[141] *See generally* B. Siegan, *Economic Liberties and the Constitution* (1980).

present here, the aggregate of which have not been present in other cases, and each of which demonstrates the purely private nature of Chapter 516's takings.

(a) *The takings may only be initiated by the very people who will receive the property.* Chapter 516 leaves the taking decision in the hands of the very parties who will ultimately receive the condemned property, who are left without any standard against which their decisions are to be measured, and who, by definition, are not accountable to Trustees or to the public for their decisions.[142] The checkerboard pattern of condemnations contemplated by Chapter 516 epitomizes the Act's failure to achieve its stated public uses and points up the fact that specific private parties are permitted to acquire the private property of others. Indeed, if there is a public necessity for the takings, why are condemnation decisions left to private parties who may or may not exercise their right and proceed with a taking?

(b) *The takings are paid for by the private recipients of the transfer.* As the Court recognized in *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), takings by the government for itself must be sharply distinguished from takings by private parties for themselves.[143] Transfers to private parties who themselves finance the takings cost the majority of the public nothing, while each member or group of the majority is given the ever-present opportunity at some future time to benefit from such redistribution. By contrast, where the government, and therefore the public, pays for the taking,

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[142] *Compare, e.g., Berman, supra* (government redevelopment corporation); *Welch, supra* (TVA); *Brown, supra* (government); *Fallbrook, supra* (irrigation district).

HHA's hearing is simply a formality in light of the legislature's statement that *any* condemnation will serve a public use (page 26, *supra*). HHA's scrutiny is limited to ascertaining whether sufficient numbers of lessees have applied to purchase.

[143] *See, e.g., Welch, supra* (government provided compensation); *Old Dominion Land Co.*, 269 U.S. 55 (1925) (same); *Fallbrook, supra* (public bonds).

there is a safeguard against the possibility that one group has simply captured governmental power for its own benefit, since the public is not likely to be willing to confer such benefits on any particular group without a public use that will be served thereby.[144]

(c) *The only property taken consists of the ground lots upon which the new owners already own houses.* It is apparent that the real purpose for this taking is simply to provide the lessees with title to the lots they presently rent. There is no taking of undeveloped land for use in an improved or new fashion, or of worthless property to give it life, or of property of any type to use it in any manner other than for the simple satisfaction of the lessees.[145]

(d) *The takings transfer property from one private party to another.* This factor readily distinguishes this case from those in which the government has taken land for its own use[146] or for use by the public under government auspices.[147] There are sound reasons for placing great weight upon the government-use factor. That is because, even though "[t]he test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated" (*Milheim*, 262 U.S. at 719), "where the land is taken by the government itself, there is not much ground to fear any

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[144] As one contemporary scholar has observed, "* * * one of the reasons the takings clause requires the public to *pay* for what it takes is to help ensure that what is paid for benefits the public, since the public will soon tire of paying for purely private acquisitions that do not benefit the commonwealth." L. Tribe, "Memorandum of Constitutional Law," reprinted in *Copyright Infringements: Hearings on S.1758 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 78, 83 (1981 & 1982) (emphasis in original) (hereafter Tribe in *Senate Hearings*).

[145] *Compare, e.g., Berman, supra* (renovation of slums); *Milheim, supra* (tunnel through mountain); *Clark, supra* (irrigation); *Fallbrook, supra* (same).

[146] *See, e.g., Old Dominion Land Co., supra* (military warehouse); *Gettysburg Elec. Ry. Co., supra* (military cemetery).

[147] *See, e.g., Welch, supra* (public park).

abuse of the [taking] power." *Gettysburg Elec. Ry.*, 160 U.S. at 680. Not only is the government accountable to the people for its actions, but the citizenry has an opportunity to exercise oversight where the government will be the responsible party. Takings by the government for itself or the entire public are far less likely to reflect a simple preference for one party over another and, on their face, do not involve the naked transfer of property from *A* to *B*, the core prohibition of the Public Use requirement. In this case, HHA merely serves as a conduit for the passage of title.

(e) *The takings effect no change in the use or usability of the property or its environs; only title passes.* This factor distinguishes the instant case from the vast majority of the takings previously upheld by the Court.[148] A taking which effects at least some change in the use of the property documents the public need for the transformed use, and negates the risk that the government will simply satisfy the acquisitive desires of some private parties.[149] A condemnation of property to effect an improvement, particularly one that will change the nature

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[148] *See, e.g., Berman, supra* (elimination of slums); *Welch* (development of public park); *Milheim, supra* (construction of a railroad tunnel); *Rindge Co.*, 262 U.S. at 706-707 (construction of a road); *Mt. Vernon, supra* (power plant); *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (aerial tramway for mining); *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (flooding of land for water power). *See also Puerto Rico* v. *Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946) (conversion of sugar lands into small farms); *Poletown Neighborhood Council* v. *City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (*per curiam*) (automobile plant). It is important to note that *Poletown* did *not* involve the federal Constitution; the taking was questioned only under the *state* constitution.

[149] HHA's argument (HHA Br. 33) that the Act will shift land from speculative investment to personal residential use overlooks the lack of any statutory restraint upon *lessees'* speculative investment use of the property and the lack of any requirement that the transferee live on the lot (*see* page 13, *supra*).

of the use of the land, further enhances the likelihood that the taking is for a legitimate public use.[150]

(f) *There is no continuing government oversight, regulation, or control once the transfer to other private parties is completed.* Government oversight of takings to redevelop dilapidated communities[151] or with respect to regulated industries for the performance of their assigned functions[152] is important to assure that genuine public uses are fulfilled. In redevelopment takings, the public use is protected by restrictions imposed by the redevelopment plan. Likewise, where the transfer is to a regulated industry, over which the government, and therefore the public, has direct and immediate control, the populace has the opportunity for continuing oversight. Government oversight or control assures that a public use not only precipitates the taking but also continues to play an important role after the taking is completed. There are no such assurances here.[153]

(g) *There is no obligation on the part of the parties receiving the property to conform to any predetermined plan for its use.* Where there is a legitimate necessity for taking someone's property, the condemning authority

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[150] *See, e.g., Berman, supra* (elimination of a slum); *Clark* v. *Nash, supra* (irrigating otherwise valueless land); *Fallbrook, supra* (same). *See also Eastern Sugar, supra* (overall plan for redevelopment of sugar industry).

[151] *See, e.g., Berman, supra.*

[152] *See, e.g., Mt. Vernon, supra* (hydroelectric power company); *Milheim, supra* (tunnel for railroad, telephone, telegraph, water, power, automobiles, and the like); *O'Neill* v. *Leamer, supra* (railroad spur track); *Hairston* v. *Danville & Western Ry. Co., supra* (same).

[153] Zoning laws are insufficient in this regard. Where there is no change in the use of the land, either contemplated or carried out, the zoning laws do not come into play. Here, the lessees quite obviously do not want to change their use of the land, and would surely oppose any rezoning of their homes for commercial, agricultural, conservation, or any use other than residential.

often requires the recipients to conform to a predetermined plan. That requirement helps to guarantee that the property will, in fact, be put to the public uses contemplated by the condemning authority rather than be diverted, after acquisition, to other uses, public or private. This was one of the reasons given by the Solicitor General, for example, in urging the Court to uphold the takings in *Berman*.[154] But no such requirement exists here. Indeed, the random takings permitted by the Act preclude formulation of any plan.

3. If the taking of Trustees' title could be justified here, in spite of the clear private taking factors evident upon the face of the statute, there simply would be no practical limit upon the exercise of the ultimate sovereign power of eminent domain. The text and operation of the statute constitute the only objective measure of its purpose. As opposed to the reality of the statutory text, the legislative findings here are no more than creative rhetoric. Any public body authorized to exercise the power of eminent domain has available to it a litany of "findings" to justify alleged benefits to the public. Such findings could even be used to support the transfer from the many to the few, from the poor to the well-to-do. A few hypotheticals will make the point.

> —A city council wishes to entice an extremely wealthy financier to move to the city. He is reluctant to come because there is insufficient vacant land to satisfy his desire for a large private estate. The council removes this barrier by condemning an extensive area of the city where poor people live, allowing the financier to force the sale by the families in that area of their houses and land. The

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[154] *See, e.g.*, Brief for Appellees D.C. Redevelop. Land Agency and Nat'l Cap. Planning Comm'n, in *Berman* v. *Parker*, No. 22, O.T. 1953, p. 28: "The lessee or purchaser is not given a free hand to deal with the property as he wishes. Instead, he is expressly required to conform to the redevelopment plan." Likewise in *Eastern Sugar*, *supra*, the condemnation pursued a public plan to revitalize Puerto Rico's sugar and liquor industries.

council supports the condemnation with specific findings to the effect that the financier will pay more taxes than the aggregate of the individual landowners; the financier has a history of philanthropy which can be expected to continue and exceed the combined contributions of the original landowners; the long-term ownership of the land by a single individual will reduce the inflation inherent in frequent sales by many landowners; and the crime rate will decline, since the financier has no prior history of criminal activities, whereas there is a high incidence of crime in the area condemned.

—A Sunbelt state is experiencing a dramatic increase in elderly residents, virtually all of whom depend on fixed income or welfare. These senior citizens rely heavily upon the state's medical and social services resources, although they are unable to pay the full cost for such services. As a result, the state has a negative cash flow. The state legislature passes an eminent domain statute to the effect that any professional with an income of over $100,000 a year may force the sale to him of any retired person's land and home. The key finding supporting the statute is that the continuity and economic stability of the state depends upon increased taxes, lower social service pay-outs, and the existence of a balanced population in terms of age.

—A portion of a single county in the West is populated by successful small farmers, but most of the county's citizens are city dwellers. The county's only private club is a tennis/social club, located on the border between the county's rural and urban areas. The club's members, most of whom are city dwellers, wish to enhance their club by adding a golf course. The county council condemns all of the farms, selling to the club sufficient acreage for the golf course, new clubhouse, locker rooms, pro shop, and parking. So as not to lose the crops which otherwise would have been grown, the council sells the remainder of the farm area to an agri-business combine. The council justifies the condemnation on

grounds of aesthetics, improved public health through the use of sports facilities, encouragement of efficient farming by a single land-use operation, and an assured decrease in crime by virtue of fewer families and young people in the area and the creation of jobs at the club.

Some of the "findings" put forth to support the exercise of eminent domain in these hypotheticals are tenuous at best. Others, however, have at least some basis in fact. For example, a legislature could cite a string of studies to buttress its conclusion that transferring land from poor people to rich people will cut down on the incidence of crime, because many commentators have concluded that "street crime" is substantially higher in areas with low-income families and poor housing.[155] "Findings," in other words, are easily come by and can always be used to justify predetermined conclusions. It is for this reason that due deference to legislative findings should never be converted into an abdication of the proper role of the judiciary in this important area of the law.[156] It should also be noted that all three of the above hypotheticals have more attributes of a public use than Chapter 516, because two contemplate a change in the use of the condemned property, while the other involves a change in occupancy and possession.

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[155] *E.g.*, Glasser, *Economic and Sociocultural Variables Affecting Rate of Youth Unemployment, Delinquency and Crime*, 11 Youth & Society 53 (1979); Jacobs, *Inequality and Economic Crime*, 66 Sociology and Social Research 12 (1981); National Institute of Justice, U.S. Dept. of Justice, *Factors Influencing Crime and Instability in Urban Housing Developments* (1980); Clelland & Carter, *The New Myth of Class and Crime*, 18 Criminology 319 (1980); Rodman, *Poverty and Delinquency: A Theoretical Review* in *Theoretical Perspectives on School Crime* (1978); Skogan, *The Distribution of Big-City Crime: A Multi-City Time-Series Analysis*, 13 Urban Affairs Q. 33 (1977).

[156] It is no answer to these hypotheticals that the electorate will be the ultimate judge of any excesses or misjudgments by their elected representatives. By the time the electorate has a chance to change representatives, land may already have been irrevocably taken from its owners, and a retransfer would raise the same problems.

The appropriate inquiry therefore must be to examine the taking, not simply the state's supporting rationale, because it is the *taking* that the Constitution requires to be for a "public use." The analysis proposed here—one requiring an assessment of a proposed taking in light of the seven objective factors outlined above derived from the Court's prior decisions (pp. 54-58)—will permit the courts to resolve public use issues without succumbing to unblinking acceptance of a legislature's judgment or to subjective second-guessing. That analysis is similar to the one the Court has employed to determine whether a regulation effects a taking. In that regard, the Court has eschewed reliance upon a set formula in favor of engaging in "essentially ad hoc, factual inquiries" (*Penn Central*, 438 U.S. at 124) guided by "judgment" as much as "logic" (*Andrus* v. *Allard*, 444 U.S. at 65) to determine whether the state must compensate an aggrieved party. As applied here, the appropriate inquiry would require a court to gauge the nature of the taking by means of the objective, constitutionally significant factors above noted to determine whether that taking is "for public use." [157]

Application of those factors in this case does not require the Court comprehensively to define the full range of constitutionally significant criteria or to identify the weight to be given each one. Because each of the seven factors would surely be material to any inquiry, and because all of them in the aggregate demonstrate the private nature of the state's taking, the condemnation in this case would be unconstitutional under any reasoned test.[158]

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[157] That suggestion is nothing new. *See Fallbrook*, 164 U.S. at 159-160 ("what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned").

[158] This inquiry also will not greatly intrude upon the state's legislative authority. To be sure, the Public Use requirement makes some compensated takings forbidden, and to that extent restricts legislative authority. But that limitation has long been presumed by the Court's Takings and Just Compensation doctrines. Hence,

4. (a) Even if the Court were to conclude that reliance upon these factors was insufficient in general or in this case—a result we submit would be unwarranted—that would not end the inquiry. Contrary to appellants' suggestions, the Court is not obliged to act merely as a passive observer of the legislative process by uncritically accepting the state's declarations that these takings will serve a legitimate public use.[159] To the contrary, the Court's decisions have long made clear that the legislature's judgment is subject to judicial re-examination.

As late as 1946, Justice Frankfurter could state that "[t]his Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration ultimately by this Court." *United States ex rel. TVA* v. *Welch*, 327 U.S. at 557 (concurring opinion).[160] In so doing, Justice Frankfurter did not identify a novel rule of law.[161] With

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eliminating the companion Public Use requirement would necessarily require the Court to expand the scope of the Takings provision and Just Compensation requirements, since there will be no "average reciprocity of advantage" (*Pennsylvania Coal Co.*, 260 U.S. at 415) or "supposed benefit * * * [to the] public" (*Monongahela Navigation Co.*, 148 U.S. at 326) to offset the coercive effect of the state's action. That result would both increase the number of actions requiring compensation and augment the amount of compensation required, thereby multiplying the total cost to the state in instances in which the state has decided *not* to pay for its actions. Because there is no logical reason to believe that the one is more intrusive than the other, there is no ground for concluding that the approach suggested here will disrupt the legislative process.

[159] Professor Tribe has conceded in a different forum that judicial deference to legislative findings in terms of takings for public use is not complete. Tribe in *Senate Hearings* at 85.

[160] The courts are "not [entitled to] assume that these various statements [by the people or legislature], constitutional and legislative, together with the decisions of the state court[s], are conclusive and binding upon this court upon the question as to * * * what is a public use." *Fallbrook*, 164 U.S. at 159. To the contrary, this is a "questio[n] which * * * arise[s] under the Federal Constitution, and we must decide [it] in accordance with our views of constitutional law." 164 U.S. at 159.

[161] Nor did the majority opinion in *Welch* reject the Court's prior doctrine. To the contrary, the majority stated that " 'the question

the possible exception of Justice Douglas' opinion in *Berman*—which, as appellants interpret it, erroneously equates a taking with simple regulation (pp. 78-82, *infra*)—this Court has repeatedly stated that, while state legislative, administrative, or judicial findings are entitled to respect, it is the prerogative and duty of the courts independently to scrutinize the realities of a proposed condemnation and to invalidate those failing to pass constitutional muster.[162] That principle was specifically applied in *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U.S. at 411-417.[163] *See also Thompson* v. *Consoli-*

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of what is a public use is a judicial one' " (327 U.S. at 552), quoting *Cincinnati* v. *Vester*, 281 U.S. at 446, in which the Court rejected the contention that a legislature could bind the courts by its simple declaration of public use. *See United States* v. *New York*, 160 F.2d 479, 482 (2d Cir.) (L. Hand) (*Welch* "did not change the law by removing from all judicial review the 'public use' for which * * * property may be taken. I find it hard to believe that any such radical step was intended"), *cert. denied*, 331 U.S. 832 (1947).

[162] *See, e.g., Shoemaker* v. *United States*, 147 U.S. at 298; *Fallback Irrigation District* v. *Bradley*, 164 U.S. at 159; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U.S. at 416-417; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. at 253-254; *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. at 606; *Sears* v. *City of Akron*, 246 U.S. at 251; *Block* v. *Hirsch*, 256 U.S. at 154; *Rindge Co.* v. *County of Los Angeles*, 262 U.S. at 705; *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. at 717; *Cincinnati* v. *Vester*, 281 U.S. at 447; *United States ex rel. TVA* v. *Welch*, 327 U.S. at 552-554; *id.* at 556-557 (Reed, J., & Stone, C.J., concurring). *See also* 2A J. Sackman & P. Rohan, *Nichols The Law of Eminent Domain* § 7.4 (rev. 3d ed. 1981 & Supp. 1982).

[163] The Nebraska State Board of Transportation ordered the Missouri Pacific Railway Company to permit an association of local farmers to construct a grain elevator at its railroad depot. The Board justified that order by finding that the existing facilities were insufficient to accommodate the grain to be shipped by rail, that the public convenience would be promoted by the construction of another grain elevator upon the site of the depot, and that the railroad had unreasonably and discriminatorily refused to permit the farmers' association to construct an elevator while permitting two other parties to do so. 164 U.S. at 408-410, 411-412. The Nebraska Supreme Court, on the railroad's appeal, upheld the validity of the Board's order, observing that, while "[the Board's]

dated Gas Util. Corp., 300 U.S. at 80. The state courts, before and after *Berman*,[164] have also agreed that the

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power to make such findings and order is denied" (*id.* at 413) (citation omitted), "[t]he correctness of the findings of the board is not seriously questioned * * *." *Id.* This Court reversed, concluding that "the order in question, so far as it required the railroad corporation to surrender a part of its land to the [farmers], for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the [farmers]." *Id.* at 417.

[164] For pre-*Berman* cases, *see, e.g.*, *Pittsburgh, W. & K. Railroad Co.* v. *Benwood Iron-Works*, 31 W.Va. 710, 8 S.E. at 458 ("[t]he right to take, which depends upon whether it is to be taken for public or private use, is a judicial question * * *"); *Boyd* v. *Ritter Lumber Co.*, 119, Va. 348, 89 S.E. at 279 ("[t]he Legislature cannot make a use public by declaring it to be such. The question is whether the declared uses are in law public uses, and that is a question which the Courts must determine"); *Minnesota Canal & Power Co.* v. *Koochiching Co.*, 97 Minn. 429, 107 N.W. 405 (1906); *Healy Lumber Co.* v. *Morris*, 333 Wash. 790, 74 P. 681 (1903); *City of Gary* v. *Much, supra; State ex rel. Ford Motor Co.* v. *District Court*, 133 Minn. 221, 158 N.W. 240 (1916); *Bassett* v. *Swenson*, 51 Idaho 256, 5 P.2d 722 (1931); *Southern Ry. Co.* v. *City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912); *Komposh* v. *Powers*, 75 Mont. 493, 244 P. 298 (1926), *aff'd*, 275 U.S. 504 (1927); *Gauley & S.R. Co.* v. *Vencill*, 73 W.Va. 650, 80 S.E. 1103 (1914); *Cloth* v. *Chicago, R.I. & P. Ry. Co.*, 97 Ark. 86, 132 S.W. 1005 (1910); *Ozark Coal Co.* v. *Pennsylvania Anthracite R. Co.*, 97 Ark. 495, 134 S.W. 634 (1911); *Wilmington Parking Authority* v. *Ranken*, 105 A.2d 614 (Del. 1954); *Gohld Realty Co.* v. *City of Hartford*, 141 Conn. 135, 104 A.2d 365 (1954); *Talbot* v. *Hudson*, 16 Gray 417 (Mass. 1860); *Sadler* v. *Langham*, 34 Ala. 311 (1859).

For post-*Berman* cases, *see, e.g.*, *Hogue* v. *Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171, 181 (1959) ("[t]he legislative declaration that the development and redevelopment of these lands as provided in the Act constitute a public use, is a question to be ultimately decided by this court * * *"); *City of Little Rock* v. *Raines*, 241 Ark. 1071, 411 S.W. 2d at 493 ("[w]hether or not a proposed use for which private property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts"); *Edens* v. *City of Columbia, supra; Karesh* v. *City Counsel of Charlestown, supra; City of Owensboro* v. *McCormick, supra; Redee Inlet Authority* v. *Bastian, supra; In re City of Seattle, supra; Port*

legislature's judgment that a condemnation serves a legitimate public use does not end the constitutional inquiry.

That principle is the necessary consequence of the rule that the Public Use requirement makes certain condemnations forbidden even where the state is willing to pay for them. The contrary rule would permit the state legislature to repeal the Public Use requirement simply by reciting the proper words. *See Cincinnati* v. *Vester*, 281 U.S. at 447; *cf. Railway Labor Executives Ass'n* v. *Gibbons*, 455 U.S. 457, 473 (1982).[165] But constitutional mandates may not be negated by mere legislative declarations, however artfully and imperatively composed. As the Court recognized in *Cincinnati* v. *Vester, supra*, sustaining the constitutionality of a taking upon "a bare recital * * * would be to treat the constitutional provision as giving such a sweeping authority * * * as to

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Authority of St. Paul v. *Groppoli*, 295 Minn. 1, 202 N.W. 2d 371 (1972); *Fifth Avenue Coach Lines, Inc.* v. *City of New York*, 11 N.Y. 2d 342, 183 N.E. 2d 684 (1962); *North Carolina State Highway Comm'n* v. *Asheville School, Inc.*, 5 N.C. 684, 169 S.E. 2d 193 (1969), *aff'd*, 276 N.C. 556, 173 S.E. 2d 909 (1970); *City of Arlington* v. *Bardin*, 478 S.W. 2d 182 (Tex. 1972); *Falkner* v. *Northern States Power Co.*, 75 Wis. 2d 116, 248 N.W. 2d 885 (1977); *In re Coleman Highlands*, 401 S.W. 2d 385 (Mo. 1966); *State Highway Comm'n* v. *Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *In re Puget Sound Power & Light Co.*, 28 Wash. App. 615, 625 P.2d 723 (1981); *City of Seattle* v. *Loutsis Inv. Co., Inc.*, 16 Wash. App. 158, 554 P.2d 379 (1976); *State* v. *Bank of California, supra; Cordova* v. *City of Tucson*, 16 Ariz. App. 447, 494 P.2d 52 (1972); *State ex rel. Clothier* v. *Yeaman*, 465 S.W. 2d 632 (Mo. 1971); *Duck River Elec. Membership Corp.* v. *City of Manchester*, 529 S.W. 2d 202 (Tenn. 1975); *Arkansas State Highway Comm'n* v. *Alcott, supra; Miro* v. *Superior Court for County of San Bernardino*, 5 Cal. App. 3d 87, 84 Cal. Rptr. 874 (1970); *Redevelopment Agency of Fresno, Inc.* v. *Herrold*, 86 Cal. App. 3d 1024, 150 Cal. Rptr. 621 (1978).

[165] *See also* J. Ely, *Democracy and Distrust* 125-131 (1980) (recognizing a legislative declaration of purposes as sufficient to sustain the constitutionality of a statute will simply lead the legislature to adopt a boilerplate statement of purposes to satisfy the requirement).

make nugatory the express condition upon which the authority is granted." 281 U.S. at 447. In that respect, judicial review assures that the Public Use requirement is not reduced to lifeless words of advice, to be circumvented or ignored by the legislature under the pressures of majoritarian rule.[166]

(b) Appellants' contention that the Court of Appeals gave insufficient weight to the historical and policy justifications for Chapter 516 [167] confuses the weight to be

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[166] That conclusion is fully consistent with the Court's modern constitutional doctrine regarding every other Bill of Rights guarantee. In no other matter is the legislature's judgment final. *See, e.g., Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (First Amendment Freedom of Speech Clause); *Larson* v. *Valente*, 456 U.S. 228 (1982) (First Amendment Free Exercise Clause); *United States* v. *Lee*, 455 U.S. 252 (1982) (First Amendment Establishment Clause); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (Fourth Amendment); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (Fifth Amendment Takings provision); *United States* v. *Sioux Nation*, 448 U.S. 371 (1980) (Fifth Amendment Just Compensation requirement); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (Fifth Amendment Due Process Clause (procedural matter)); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (same (substantive matter)); *Washington* v. *Texas*, 388 U.S. 14 (1967) (Sixth Amendment Compulsory Process Clause); *Enmund* v. *Florida*, 458 U.S. 782 (1982) (Eighth Amendment Cruel and Unusual Punishments Clause); *Griswold* v. *Connecticut*, 381 U.S. 479, 495-496 (1965) (Goldberg, J., concurring) (Ninth Amendment); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Tenth Amendment).

[167] Appellants refer to the fact that Hawaii is an island and is some distance from the mainland to buttress their argument that the peculiar conditions prevailing there justify Chapter 516. But the fact that Hawaii is surrounded on all sides by the Pacific Ocean rather than fronted on one side (like Oregon), or rather than being landlocked (like Utah) adds nothing to the fact that Hawaii, like *every* state, has a fixed and finite amount of territory. In fact, other states have far worse population-land use problems than Hawaii. An example is Nevada, where 86.5% of the land is *federally* owned (excluding Indian reservations and other federal trust properties) and therefore not subject to the state's eminent domain power, with

given legitimate state interests with the legitimacy of those interests themselves.[168] Simply transferring property from *A* to *B* is an unconstitutional exercise of eminent domain, even if couched as an effort to increase the vertical or horizontal alienability of land (HHA Br. 16-21). *See* Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. at 365-369.[169] Appellants' attempt to rescue the Act by ascrib-

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much of the remaining land uninhabitable because of water scarcity. *United States* v. *New Mexico*, 438 U.S. 696, 699 n.3 (1978).

In any event, just as there is not one law for Athens and another for Rome, surely there is not one Eminent Domain Clause for the Hawaiian Islands and another for Manhattan Island. A statute simply transferring land from *A* to *B* for *B*'s private use and benefit is as unconstitutional in the one case as in the other.

[168] We question whether HHA may even advance interests such as the need to avoid "consequent disruptions in lawful social behavior" (Haw. Rev. Stat. § 516-83(7)) in support of the Act (HHA Br. 5 n.14). It is beyond question that a party may not be forced to sacrifice his federal constitutional rights simply to keep a mob at bay. HHA's argument—that the state may hand over one person's property to another simply to prevent the latter from taking it by force—would permit the state to justify its takings by enforcing a protection racket. As a unanimous Court held when presented with a similar argument, "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * '[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.'" *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (citation omitted); *cf. Loretto*, 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation").

[169] HHA's claim that the state acted with generations of future landowners in mind is also suspect because the Act transfers property to lessees *now* without imposing any restrictions upon *their* ability to impose restraints on alienation. As recently observed (in reference to proposed bills relating to home ownership of video equipment), "it can hardly be contended that the persons who will be aided by the proposed bills are the public at large. Only relatively well-to-do television owners can now afford Betamax, and the claim that Congress intends to aid all those who will *eventually* own such

ing some other public use to it is built upon an imaginative hypothecation of theoretical benefits totally divorced from the actual text and operation of the Act.[170]

(*i*) The legislative finding that the takings will satisfy lessees' desire to own their leaseholds acknowledges that the statute is simply a mechanism to transfer property from *A* to *B*. That transfer is unconstitutional. The plain text of the Constitution forbids it.[171] No decision of this Court or any other permits such a transfer;[172] to the contrary, this Court and others have re-

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costly equipment is suspect because Congress will be passing the measure when only the wealthier strata of the population possesses these machines * * *." Tribe in *Senate Hearings* 84 (emphasis in original). Similarly, the beneficiaries of Chapter 516 are the residents of Honolulu's upper-income neighborhoods. U.S. Dep't of Commerce, Bureau of the Census, *Census of Population and Housing*, Table P-11, PHC 80-2-183 (1980).

[170] Judge Alarcon properly characterized the legislative "findings" as nothing more than "statutory rationalizations" designed to camouflage the legislature's "naked attempt" to transfer private property for private use (HHA JS App. A21). "[A] court always looks to substance and not to mere forms." *Madisonville Traction Co.*, 196 U.S. at 254. *See Epstein, supra*, 1982 Sup. Ct. Rev. at 365-369. And this Court has concluded that it "need not * * * accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). *See also Mathews* v. *Lucas*, 427 U.S. 495, 508 n.14 (1976); *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n.8 (1977); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 727 n.13 (1982); *Aloha Airlines, Inc.* v. *Director of Taxation*, 104 S.Ct. 291, 295 (1983).

[171] "The Constitution nowhere sanctions the use of the legislature's power to take property for merely private purposes. * * * Takings for purely private purposes, it must be stressed, are constitutionally forbidden even where compensation is provided." Tribe in *Senate Hearings* 83, 85.

[172] HHA's reliance (HHA Br. 18-19 nn.52-53) upon *Wilson* v. *Iseminger*, 185 U.S. 55 (1902), and *Stewart* v. *Gorter*, 16 A. 644 (Md. 1889), as support for this argument is misplaced. In neither case did the statute "take" any property. The Pennsylvania statute in *Wilson* decreed that, if no demand for rent had been made for

peatedly rejected this contention. *See, e.g., Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. at 80. And the pertinent history demonstrates that eminent domain has never been, and may not be, so used.[173]

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21 years, release of the lessor's reversionary interest was presumed. As this Court, in discussing *Wilson*, recognized two Terms ago in *Texaco, Inc.* v. *Short*, 454 U.S. 516, 527-530 (1982), the transfer of property after the owner has abandoned it does not constitute a "taking" under the Eminent Domain Clause. *See id.* at 530 ("It is the owner's failure to make any use of the property—and not any action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation"). That rationale also explains this Court's decision in *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831). *See* 454 U.S. at 526-530 (discussing *Hawkins*).

Similarly, the Maryland statute in *Stewart* simply provided that where a lessor in *subsequently* executed leases chose to lease the land for more than 15 years, the leases would be subject to a tenant's right to purchase the reversion. The wholly prospective operation of that statute renders *Stewart* materially different from this case. In fact, the Maryland Court of Appeals later ruled that a retroactive change in already-executed leases would be unconstitutional, and limited *Stewart* to prospective leases only. *See Marburg* v. *Mercantile Bldg. Co.*, 154 Md. 438, 140 A. 836, 839 (1928).

[173] Appellants forget that "historical evidence must be weighed as well as cited." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751-752 n.31 (1982). None of appellants' authorities discussed eminent domain, and these references *undermine* their arguments.

For instance, the Statute of *Quia Emptores* (18 Edw. I, st. I, cc. 1-3) hardly provided relief for tenants. To the contrary, "[i]f Edward's legislation is examined, it will be seen that its general tendency is not to weaken, but to strengthen, the position of feudal lords. * * * *Quia Emptores* * * * was designed * * * to preserve those same rights of wardship, marriage, relief, and escheat. Continued sub-infeudation would probably have introduced such chaos into the system of tenures that these incidents would have eventually been evaded almost universally, but *Quia Emptores* perpetuated them. Edward I certainly did a great deal for the feudal lord." T. Plucknett, *A Concise History of the Common Law* 30-31 (5th ed. 1956) (footnote omitted). Moreover, the New York Court of Appeals ruled in 1853 that *Quia Emptores* had no effect upon the right of large landholders in this country to hold estates originally granted by the British Crown. *People* v. *Van*

HHA's attempt to justify the Act as an effort to eradicate the evil of long-term leasing and to afford the citizens of Hawaii the choice of fee simple lots cannot withstand analysis. The legislature has acknowledged that the vast majority of single-family dwellings are already situated on fee simple lots,[174] and in 1975 it deleted the requirement that HHA find a shortage of fee simple housing as a predicate for condemnation.[175] If any further

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Rensselaer, 9 N.Y. 291 (1853). *See* Sutherland, *The Tenantry on the New York Manors*, 41 Corn. L.Q. 620, 633-634 (1956).

HHA's reliance upon New York's mid-19th century efforts to break up large landed estates is also unavailing. The New York Constitution, adopted in 1787 during the height of the Revolutionary War, "expressly disclaimed any impairment of the effect of grants made before October 19, 1775." Sutherland, *supra*, 41 Corn. L.Q. at 624 (footnote omitted). *See* N.Y. Sess. Laws 1812-1815, ch. 227; N.Y. Sess. Laws 1816, ch. 177. Moreover, even though the New York legislature adopted laws taxing the landowners, limiting the length of leaseholds, and abolishing distress for a tenant's failure to pay his rent (*id.* at 632-633), "the taking of the landlord's interest by eminent domain, and its subsequent sale to the occupant of the land * * * was never attempted on the manors." *Id.* at 631. Indeed, Samuel J. Tilden, chairman of a select legislative committee assigned to study this matter, issued a widely-noted report in which he considered any such proposal to be both "doubtful and dangerous." *Report*, N.Y. State Assembly Doc. No. 156, at 17 (Mar. 28, 1846), *quoted in* Sutherland, *supra*, 41 Corn. L.Q. at 631. In light of the New York Court of Appeals' Public Use decisions in *Taylor* v. *Porter & Ford*, *supra*, *Bloodgood* v. *Mohawk & H.R.R. Co.*, *supra* (*see* note 133, *supra*), and *Van Rensselaer*, *supra*, that appraisal was eminently correct.

The Homestead Acts opened for settlement only *unappropriated public* lands (*see, e.g., Gauthier* v. *Morrison*, 232 U.S. 452, 460 (1914)), and did not entitle one party to acquire another's already-settled property. *See, e.g., Atherton* v. *Fowler*, 96 U.S. 513, 519 (1878).

[174] The legislature found in 1972 that 68.9% of owner-occupied housing was fee simple. 1975 Haw. Sess. Laws, Act 184, § 1(b) (HHA JS App. A144). This numerical superiority of fee over leasehold homes has continued to recent times (*see* note 18, *supra*).

[175] Pp. 12-13, *supra*. Judge Poole astutely noted this contradiction between the actual text of the statute and the legislature's "findings" (HHA JS App. A35).

confirmation be needed that Chapter 516 is not directed at a supposed "evil" of residential leaseholds, it can be found in the fact that the statute does not prohibit long-term residential leasing. The Act places no restriction on the lessee's post-acquisition ability to engage in the same form of long-term leasing the legislature declares to be so harmful,[176] and the state itself, under the Act [177] and other state laws,[178] may likewise engage in leasing for long-term residential use. There is not now, and never has been, any state policy against long-term leasing of residential lands.[179]

(*ii*) The legislature's finding that the transfers of title will combat inflation is baseless.[180] Unless the Hawaii legislature can alter the economics of supply and demand, transferring title cannot curb inflation. The statute will not add a foot of land or a single house to the supply; it will effect a change in ownership of only a restricted number of lots presently occupied; the lessee-acquirers will be free to lease to others at whatever rental they choose or to sell at any price they fix; and the statute's operation does not provide for, is not conditioned upon, and, realistically viewed, cannot result in the transfer of title to a large enough group of lots, either in the aggre-

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[176] Judge Poole also noted the significance of this fact below (HHA JS App. A32-33; *see id.* at A36).

[177] "The authority may lease, rent, or resell, any lot and improvements purchased by it under this part." Haw. Rev. Stat. § 516-35(c).

[178] Leasing of public lands for residential purposes is, for example, specifically authorized by Haw. Rev. Stat. §§ 171-44, 171-45, 171-60, 171-72 and 171-93. Indeed, disposition of public lands is *required to be by lease only* unless otherwise specifically authorized. Haw. Rev. Stat. § 171-32.

[179] HHA's argument that Chapter 516 is designed to bring Hawaii into the twentieth century by eliminating feudal restraints on alienation (HHA Br. 16-19) constitutes, in the face of the reality of the statute's terms, a purely academic theorem.

[180] HHA makes only passing references to this justification (HHA Br. 23).

gate or in any classification, to achieve any supposed anti-inflationary effects.[181]

In fact, the statute is bound to *increase* the inflation of land values and rentals. Transfer of ownership will *relieve* the transferred properties of the anti-inflationary controls and regulations, such as rent control and compulsory 55-year lease extensions at controlled prices, now provided by various other state statutes.[182] After acquisi-

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[181] The Act permits lots to be condemned in a random, checkerboard fashion because HHA can pursue only those condemnations which lessees themselves initiate if and when individual lessees desire and can furnish the funds (*see* pp. 12-13, *supra*). It is entirely possible that, as lessees become aware that condemnation proceedings require them to pay fair market value, only a few fee simple titles in a development tract of a thousand leaseholds may be taken. The lessee may at any time decide not to purchase if he suspects that the condemnation award would be greater than he wishes or can afford to pay.

[182] Comprehensive statutory regulation of the conduct of residential lessors under long-term leases include the following provisions of the Hawaii Revised Statutes:

(1) Irrespective of lease provisions to the contrary, rent cannot be renegotiated more frequently than every 15 years (§ 519-2(a)(1));

(2) Upon renegotiation, lessors are strictly limited by statutory formula as to the rent which may be charged (§ 519-2(a)(2));

(3) If the lessor and lessees disagree as to amount of renegotiated rental, the HHA invokes mandatory arbitration to resolve any disputes (§ 519-2(b));

(4) Lessees are guaranteed the right to extend the lease to a new term of 55 years at a formula-controlled fixed rental (§§ 516-65 and -66);

(5) Lessees are guaranteed the right to free assignment of lease, without lessor's consent (§ 516-63);

(6) Lessors are forced to purchase lessees' on-site improvements, if lessees decide not to remove them at termination of their leases, or must extend the lease term for at least 30 years (§ 516-70);

(7) Lessees are guaranteed the right to cure any lease default (§ 516-64); and

(8) Lessors are prohibited from discriminating in leasing on basis of race, religion, sex, ancestry, or physical handicap (§ 516-62).

tion, lessees may sell or lease the land at whatever price and or time they choose.

(*iii*) Appellants also contend that the Act can be supported as an effort to diminish the "concentration" of land ownership. To the extent that appellants seek to justify these takings as an effort to break up a "monopoly" or "oligopoly," it is telling that the Act itself contains no finding that a land "monopoly" or "oligopoly" exists in Hawaii. That omission, in light of the legislature's efforts to buttress the Act's constitutionality, surely proves that the legislature did not premise Chapter 516 upon any such finding.[183]

The statute is not, in any event, aimed at eliminating any supposed concentration of land ownership. It applies to *all* landowners who lease residential lots. On the one hand, it applies to owners of tracts as small as five acres,[184] but, on the other hand, it does not affect owners of vast tracts who have not chosen to lease lots for residential use. Rather than attack concentration of ownership, Chapter 516 simply operates to divest of title those landowners, large or small, whose lessees desire and can afford to buy the fee simple interest.[185]

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[183] The omission was not an accidental oversight. A legislative committee had recommended this very purpose for the Act in *1967* (*see* Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799), but the legislature did not adopt this rationale then, nor has it done so in the 17 years since. The only "finding" concerning the economic power of large landowners is a passing reference to oligopoly in an entirely different statute, Haw. Rev. Stat. Chapter *519*, a rent control law (HHA JS App. A149). It is therefore plain that the legislature knew how to make such a finding when it wished to do so. Chapter 516 contains no such finding.

[184] Under the statute, the lessees may petition HHA to condemn all or a portion of a "development tract" (Haw. Rev. Stat. § 516-22), defined as "a single contiguous area of real property not less than five acres in size." Haw. Rev. Stat. § 516-1(2).

[185] Appellants argue (HHA Br. 22; Portlock Br. 6-8) that Chapter 516 can be justified as a "divestiture" measure, relying upon *Exxon Corp.* v. *Maryland*, 437 U.S. 117 (1978). Their con-

(*iv*) Chapter 516, likewise, has nothing to do with goals such as furthering home ownership or ameliorating the lot of senior citizens.[186] The statute cannot increase the supply of housing or control its cost; it neither creates new houses nor imposes price controls. Landowners are already providing housing; no one contends otherwise.[187] The problem lies in the shortage of presently-available lands for *new* housing, which is in large measure traceable to the state's deliberate policy of curtailing urban and residential expansion and of preserving large acreages for agricultural and conservation purposes.[188] Indeed, Trustees and other owners of substantial amounts of land

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tention is unfounded. First, as we have shown (*see* page 73 and note 183, *supra*), the statute is not an anti-monopoly or anti-oligopoly act. Second, the legislature could not constitutionally declare the existence of a monopoly by statutory fiat. *See McFarland* v. *American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916). Finally, the Maryland statute at issue merely barred a specific business practice; the operation of retail gasoline stations by petroleum producers or refiners. The affected owners had several years to choose either to discontinue operation or to dispose of the stations by private sale. And, unlike the present case, no property was taken.

[186] *E.g.*, Haw. Rev. Stat. § 516-83(a)(6), (7), and (11).

[187] As Judge Poole noted below, "the large landowners have made residential homesites available, albeit through the traditional leasehold arrangements" (HHA JS App. A36). With land areas limited, the demand for single-family detached dwellings is not easy to satisfy—a problem not unique to urban Hawaii. Condominium residences exist in surplus numbers, however, and of course are entirely unaffected by the statute. (*see id.* at A38 and n.9).

[188] State policy for many years has been to limit population growth, to preserve agricultural and conservation lands, and to prohibit "urban sprawl." *See, e.g.*, State of Hawaii, *General Plan* 36 (1961); General Plan Revision Program, Department of Planning and Economic Development, *State of Hawaii Growth Policies Plan: 1974-1978*, at 63 (1974); and *Report of the Temporary State Commission on Population Stabilization* 1-3 (1972). HHA's reference to the state's purchase of land in Waiahole-Waikane (HHA Br. 5 n.14) is entirely out of context. Chapter 516 did not apply to those lands. The state acquired the land to retain the existing agricultural use and to prevent development of residential lots. This incident proves Trustees' point, not appellants'.

in Hawaii, including land in or near urban centers, are prohibited from making additional land available by state zoning restrictions [189] and enormous amounts of land, including land in or near urban centers, are owned by the state and reserved for non-residential uses.[190]

For the same reasons, Chapter 516 will not assist the elderly. Chapter 516 will not produce one new house and will not reduce the cost of living for any senior citizen.[191] The beneficiaries of Chapter 516 are not the elderly or infirm, but the residents of Honolulu's upper-income neighborhoods who desire to acquire Trustees' fee title for their own private use and who have the economic means to do so.

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[189] Hawaii has a state-wide zoning system under which all lands are classified for urban, rural, agricultural, or conservation uses. Local governments may not override this system. Haw. Rev. Stat. Chapter 205. Under it, 86% of Trustees' land on Oahu, and almost 97% statewide, is zoned for non-urban, non-residential uses. For the state as a whole, the State Land Use Commission has zoned over 96% of all land for non-residential uses. *State of Hawaii Data Book* table 154, at 178 (1982).

[190] The state owns 34.5% of all land. *State of Hawaii Data Book* table 155, at 179 (1982). Some of these holdings could be made available to satisfy the purported shortage of fee simple lots; yet, despite specific constitutional (Haw. Const. Art. XI, § 10) and legislative (Haw. Rev. Stat. §§ 171-13, 171-45, 171-60, 171-70 through 171-84, and Haw. Rev. Stat. Chapter 206) authority to use public lands for residential purposes, the state has generally chosen not to do so. The state is also expressly authorized to use existing public lands, or to acquire public lands in exchange for private lands, to convert leaseholds to fee simple ownership (Haw. Rev. Stat. §§ 171-50.1 and 171-50.2) but has never done so. The state's cry of land shortage in the face of its own vast holdings starkly emphasizes that a shortage of fee simple land in Hawaii is not what Chapter 516 is about.

[191] Existing regulatory measures already control renegotiated lease rents. Haw. Rev. Stat. § 519-2. Chapter 516 has no provision restricting lease rents; nor can it be maintained that by permitting condemnation of fee title, the act will rescue the elderly from the burdens of paying lease rent, for senior citizens who cannot presently afford to pay rent would in no event be able to pay the much larger cost of purchasing fee title.

D. The Question of Whether Chapter 516 Serves a Public Use Cannot Be Answered Simply by Asking Whether the Act Is a Valid Police Power Regulation.

Appellants insist that the Public Use requirement is satisfied if the subject matter of the condemnation is within the state's police power, and that the condemnations authorized by Chapter 516 must therefore be upheld if they can rationally be said to further any conceivably legitimate state interest. That contention is flawed in several respects.

1. To support that interpretation, appellants rely primarily upon Justice Douglas' opinion in *Berman*. But "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). We submit that *Berman* should not be construed that broadly. Justice Douglas' opinion must be read in the context of the now-classic redevelopment condemnation—in which private gain is only incidental to the overall public use of revitalizing a decaying community[192]—rather than in terms of the very different and heretofore unknown use of the taking power at issue here—under which private gain is the admitted consequence of the Act's adoption.[193]

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[192] "The controlling motive for the condemnation is to clear from the area in question the moral and physical blight which slums and congestion have created, and this dominant aspect of the case establishes the public use. * * * It is not the object of the statute merely to permit the transfer of property from one individual to another. The sale and leasing of the land to private interests is incidental to the accomplishment of the primary purpose." J. Sackman, *Public Use—Updated*, in *Proceedings of the Institute on Planning, Zoning, and Eminent Domain*, 203, 214-215 (1983).

[193] The dramatic difference between *Berman* and this case is pointed up by a single sentence in the Solicitor General's brief in that case:

> The primary basis of appellants' attack upon the Act is the fact that *after the land in the area is acquired and cleared*, and appropriate portions *set aside for public facilities*, the remainder will, *if feasible*, be leased or sold to private individuals or

In that respect, Justice Douglas' sweeping declaration of the broad power of the legislature to determine whether the taking served the public welfare is not inconsistent with our submission. Justice Douglas did not state, and could not have intended to imply, that the Public Use requirement was an unwanted child among the Bill of Rights guarantees.[194] While appellants point to *dicta* in *Berman* as supporting their position, the facts of that case actually demonstrate the extraordinary difference between what the Court was ruling upon there and what appellants would have the Court rule here. In *Berman* (a) an identified tract of known size and location was taken, (b) *all* of the property was commercial property, (c) the taking was pursuant to a comprehensive, cohesive

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corporations *for redevelopment according to the plan.* [Brief for Appellee D.C. Redevelop. Land Agency and Nat'l Cap. Planning Comm'n, p. 25 in No. 22, O.T. 1953, *Berman* v. *Parker* (emphasis added).]

Here, the land is not acquired and cleared by the government, portions are not set aside for public facilities, there is no question but that the property will be sold to private individuals, no redevelopment will take place, and there is no post-acquisition plan to which the purchaser must conform.

Moreover, in his brief to the Court, the Solicitor General in *Berman* repeatedly emphasized that what was involved there was the elimination and prevention of slums (pp. 2, 10, 11, 12, 13, 18, 19, 21, 24, 28, 32, 34, 35, 36, 37, 38, 41, 42, 43, 44); slum or slum-breeding conditions (pp. 10, 11, 19, 24, 28, 30, 38, 45, 46); slum problems (p. 2); slum prevention (pp. 37, 43); slum clearance (p. 42); substandard housing and dwellings (pp. 2, 3, 4, 10, 19, 21, 24-25, 32, 41, 42, 56); substandard conditions (pp. 42-43); blight (pp. 3, 5, 35, 37); blighted areas, territories or neighborhoods (pp. 3, 4, 5, 10, 19, 20, 21, 24, 32, 37, 44, 56, 57); blighting factors (p. 5); housing blight (p. 38); urban blight (p. 36); urban decay (p. 37); unsafe and unsanitary housing conditions (p. 20); deteriorated areas and neighborhoods (p. 36); dilapidated and unsanitary structures (p. 38); and alleys used for human habitation (p. 3).

[194] Justice Douglas observed that legislative power is "[s]ubject to specific constitutional limitations" (348 U.S. at 32)—of which the Public Use requirement is one—and prefaced his discussion of the reasonableness of the taking in that case by acknowledging that "the object [of the condemnation must be] within the authority of Congress" (*id.* at 33); *see also id.* at 35-36.

public plan, (d) the purpose of the taking was to redevelop a large area in order to eliminate and prevent them and substandard housing conditions, (e) the property was actually taken by the government and then resold or leased, (f) the reselling or leasing was subject to carefully drawn conditions designed to accomplish the purposes of the anti-slum Act, and (g) substantial amounts of land were taken for public agencies for use as utilities, schools, recreational facilities, and the like. *None* of these factors is present in this case.

But if Justice Douglas' opinion in *Berman* did interpret the Public Use requirement to require nothing more from the courts than a nod in the direction of the legislature's statutory findings and declaration of public use, as appellants contend, then we submit that the Court ought to re-examine and limit his broad dicta for the following reasons.

2. (a) Appellants' argument entirely ignores the material differences between the state's taking power and its police power. There is no Public Use limitation on the state's regulatory authority. Hence, the redistribution of property through regulation need not satisfy the Public Use (or Just Compensation) requirement, simply because regulation falling short of a taking is not affected by the Eminent Domain Clause at all.[195]

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[195] The question of whether a taking is a legitimate exercise of the state's police power is simply the beginning of the inquiry. In every case "the government's chosen means must rationally further some legitimate state purpose" (*Moore* v. *City of East Cleveland*, 431 U.S. at 498 n.6 (plurality opinion of Powell, J)), and police power regulations failing that test will be struck down as being unconstitutionally arbitrary or capricious. *See id.* at 513-521 (Stevens, J., concurring in the judgment); *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See also San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 633-634 (1981) (Rehnquist, J., concurring but expressing "agree[ment] with much of what is said in the dissenting opinion of Justice Brennan" on the merits); *id.* at 656 (separate opinion of Brennan, J., joined by Stewart, Marshall, & Powell, JJ., dissenting from the majority's refusal to consider the merits). Hence, even if Chapter 516 were

(b) Moreover, appellants cannot so cavalierly expunge the Public Use requirement from the Constitution. The Court has recently made clear that affirmative constitutional limitations upon legislative power may not be so evaded. In *Railway Labor Executives' Ass'n* v. *Gibbons*, *supra*, the Court ruled that the constitutionality of selective Congressional bankruptcy laws must be measured against the Bankruptcy Clause, rather than the Commerce Clause, because the former contains a uniformity limitation absent from the latter. 455 U.S. at 468. Aware that "[u]nlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States" (*id.*), the Court accepted as indisputable the conclusion that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-469. Appellants' argument suffers from the same flaw the Court recognized in *Gibbons*.

The Court has also consistently refused to permit police power justifications such as the protection of state residents' health or safety to immunize state economic measures from scrutiny under the Commerce Clause, which *lacks* a specific limitation on state legislative power, unlike the Public Use requirement.[196] For ex-

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a legitimate exercise of the state's police power—a proposition we dispute (pp. 82-83, *infra*)—that would at best be a necessary but, by itself, insufficient prerequisite for constitutionality. *Cf. San Diego Gas & Elec.*, 450 U.S. at 656 (separate opinion of Brennan, J.). These condemnations must still satisfy the Public Use requirement.

[196] "In terms, the [Commerce] Clause is a grant of authority to Congress, not an explicit limitation on the power of the States. In a long line of cases stretching back to the early days of the Republic, however, this Court has recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens upon interstate commerce." *Western & Southern Life Ins. Co.* v. *California State Board of Equalization*, 451 U.S. 648, 652 (1981).

ample, highway safety measures are among those "the Court has been most reluctant to invalidate" (*Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 443 (1978)), and are entitled to both a "strong presumption of validity" (*Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959)) and freedom from federal court "second-guess[ing] [of the] legislative judgment about their importance" so long as their "safety justifications are not illusory * * *." *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (citation omitted). Nonetheless, the Court has made clear that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack," because the law "may further the purpose so marginally, and interfere with commerce so substantially * * *," as to be constitutionally infirm. *Id.* at 670.[197]

(c) Appellants' argument is also inconsistent with settled Takings and Just Compensation doctrine. The Court's decisions have recognized that both provisions restrict the state's condemnation power in ways distinct from the general due process limits. Accordingly, the Court has ruled that the inquiry in each case is not confined to the question of whether a particular action is a valid exercise of the state's police power.[198]

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[197] State economic measures that either directly regulate interstate commerce (*see, e.g., Edgar* v. *Mite Corp.*, 457 U.S. 624, 641-643 (1982)) or simply favor domestic interests (*see, e.g., Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)) are virtually per se invalid, even where the regulation is designed to protect a resource "essential for human survival," like water. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 952 (1982).

[198] Writing for this Court long ago, Justice Holmes acknowledged that a state's police power was necessarily broad (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 413), but he nonetheless distinguished between regulation and condemnation. He ruled that where "regulation goes too far it will be recognized as a taking" (*id.* at 415), even where, as the dissent argued, that regulation is "imposed to protect the public health, safety, or morals from dangers threatened." *Id.* at 417 (Brandeis, J., dissenting). The Court has often reiterated that proposition since *Mahon* (*see, e.g., Pruneyard*

In each instance the Court has ruled that the legislature's judgment does not end the constitutional inquiry. Whether the question is, "has a taking occurred" or "has just compensation been paid," this Court's decisions have consistently emphasized that the purpose for which the Eminent Domain Clause was adopted—to "ba[r] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. at 49)—forecloses any argument that a legislature's judgment can be wholly unfettered, even where the legislature has declared that its actions will

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Shopping Center v. *Robins*, 447 U.S. 74, 83 (1980)), and has also recently applied the doctrine in three different contexts, ruling in each case that an otherwise valid exercise of the state's police power was nonetheless subject to the requirements of the Eminent Domain Clause. *See United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982) (Eminent Domain Clause limits Congress' authority under Bankruptcy Clause); *Loretto*, 458 U.S. at 425 (Eminent Domain Clause limits state's police power); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-173 (1979) (Eminent Domain Clause limits Congress' authority under the Commerce and Admirality Clauses). Hence, just as "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration * * *" (*Webb's Fabulous Pharmacies*, 449 U.S. at 164), so too a state may not escape the effect of the Takings provision simply by labeling its actions as an exercise of its police power.

Likewise, a legislative declaration that a certain amount or formula of compensation is "just" does not end the constitutional inquiry. This Court has long recognized that "[i]t does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." *Monongahela Navigation Co.* v. *United States*, 148 U.S. at 327. Because "the determination of the measure of just compensation for a taking of private property 'is a judicial and not a legislative question'" (*Sioux Nations*, 448 U.S. at 417 n.30 (citation omitted)), "no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States* v. *New River Collieries Co.*, 262 U.S. 341, 344 (1923). *See also United States* v. *564.54 Acres of Land*, 441 U.S. 506 (1979).

advance the public welfare. Because the legislature's judgments reflect, at best, only the majority's will—which the Eminent Domain Clause has as its purpose to limit—the Clause cannot be given effect if the legislature's judgments are self-sustaining. Given that purpose and the lack of a textual, structural, or historical reason for treating Public Use questions differently, it is plain that the state's declaration that the public welfare will be advanced by its actions, while necessary to withstand constitutional challenge as being arbitrary or capricious, is not by itself sufficient to satisfy the Public Use requirement.[199]

III. CHAPTER 516 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Chapter 516 Authorizes the Condemnation of Trustees' Property for the Purely Private Gain of the Lessees.

Our submission in Point II confirms that Chapter 516 does not rationally implement a legitimate public policy, and therefore violates due process. *Moore*, 431 U.S. at

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[199] Payment of "full" compensation (HHA Br. 15) cannot pardon a private taking. The Just Compensation and Public Use requirements are complementary provisions, not alternative ones. The Public Use requirement was designed to assure the citizenry that the property in which they have invested not merely their monies but also all those "subjective needs and attitudes" that make up what each person can call his own (*Kimball Laundry Co.* v. *United States*, 338 U.S. at 5)—attributes that no amount of money can ever replace—will not be forever expropriated unless the government can establish a public use justification for doing so. Moreover, purely private takings leave an aggrieved party *undercompensated* because there is no "benefit that the owner may receive in common with all from the public uses to which his private property is appropriated" which offset the destroyed "personal element" suffered by the condemnee. *Monongahela Navigation Co.*, 148 U.S. at 326. Hence, purely private transfers of property will *not* be fully compensated. *See* Tribe in *Senate Hearings* at 85. HHA's argument, which ascribes no purpose whatever to the Public Use requirement (HHA Br. 34), thus seriously misreads the constitutional text.

514, 520-521 (Stevens, J., concurring); *Nectow*, 277 U.S. at 188-189. The Act's provisions have no rational connection with any of its proclaimed goals of curbing inflation, eliminating a concentration of land ownership, and providing fee simple residential houselots (pp. 70-75). The legislative "findings" are only self-serving rhetoric adopted to obscure the statute's purely private object—to benefit a narrow class of lessees at the expense of a political minority of lessors—a goal which "cannot constitute a *legitimate* governmental interest." *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original); *see Zobel* v. *Williams*, 457 U.S. 55, 62-64, 65 (1982). And even assuming that the legislature had a legitimate public end in mind, the method employed by Chapter 516 "has so speculative and attenuated a connection to [these ends]" as to represent no more than "the exercise of a strained imagination." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring).

B. Chapter 516 Impermissibly Delegates State Eminent Domain Authority to Financially-Self-Interested Private Parties.

Compounding the *substantive* failings of Chapter 516 are two *procedural* infirmities which present independent reasons for upholding the Court of Appeals' judgment. On the one hand, due process forbids the state from delegating absolute, standardless authority over the right to invoke its eminent domain power to private parties, who are neither legally nor politically accountable to those over whom they may exercise authority or to the public for the criteria that guide their decisions. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928); *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). *See also City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 677-678 & n.12 (1976). And, on the other hand, due process also forbids the state from vesting decisionmaking authority over a person's property in the hands of parties who have a direct, personal, and substantial pecuniary interest in the

outcome of their judgments. *Connally* v. *Georgia*, 429 U.S. 245 (1977) (*per curiam*); *Gibson* v. *Berryhill*, 411 U.S. at 578-579; *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[200]

As the Court of Appeals recognized,[201] although the lessors' current use is manifestly entitled to due process protection,[202] the power delegated to private lessees by the Act, blessed as a proper public use in every instance,[203] entitles them to expropriate a lessor's fee simple title. And the lessees obviously have a direct, personal, substantial, and pecuniary interest in the outcome of the condemna-

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[200] Together, these decisions protect a person against the arbitrary deprivation of his property by assuring that the decisionmaking process is neither so unrestrained as to permit virtually any reason, including "so arbitrary a thing as taste" (*Eubank*, 226 U.S. at 144), to be dispositive, nor so directly and inevitably channelled towards one intrinsically-unfair result (*Tumey*) as to render the decisionmaking process simply a hollow formality.

[201] HHA JS App. A32 ("[u]nder [Section 516-22], the Hawaii Housing Authority may elect to condemn only those lots which lessees have applied to purchase" (Poole, J.)); *see id.* at A2.

That HHA holds a hearing *after* the lessees' application does not detract from this conclusion. *Ward* clearly rejected the proposition that provision for an appeal from the judgment of an initial biased decisionmaker can rehabilitate the due process infirmities inherent in the initial decision. 409 U.S. at 61-62. Moreover, since the state legislature has declared that *any* and *all* takings will serve a public purpose (page 26, *supra*), the follow-up hearing is simply a formality, as the evidence introduced below demonstrates (JA 162-165).

[202] The lessors' right, as a legitimate incident of ownership, to rent their property rather than sell it is unquestionably entitled to constitutional protection. *See Roberge*, 278 U.S. at 121 ("[t]he right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution"). Even under Chapter 516, the lessors' current, entirely-lawful possession and use are left undisturbed until a lessee, for any reason, applies for the right personally to use the state's eminent domain authority to obtain title.

[203] Haw. Rev. Stat. §§ 516-83(a)(10) & (12); page 26, *supra*. That compensation is awarded for such takings cannot rehabilitate the due process violation. *See* Nos. 83-141 & 83-283 Motions to Affirm 26-27 n.70.

tion proceedings notwithstanding their payment of compensation for Trustees' property.[204] Because the takings authorized by Chapter 516 can only be initiated by the unlawfully-delegated actions of financially-self-interested private parties, *Eubank* and *Tumey* require that any condemnation so initiated be set aside.

IV. CHAPTER 516 VIOLATES THE CONTRACT CLAUSE OF THE CONSTITUTION.

Retrospective application of Chapter 516 severely impairs the obligations of pre-existing lease contracts in violation of the Contract Clause.[205] The Contract Clause is an especially vital constitutional limit upon state impairment of antecedent contractual obligations if, as appellants contend, eminent domain is simply a *means* to an end.[206] In that respect, this question cannot be resolved simply by characterizing the state's action as a "taking," rather than an "impairment," of a contract. If *Berman* has so modified the Public Use requirement as to make the state's eminent domain power the equal of its police power, then *Berman* has also eliminated the dis-

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[204] This is necessarily so for at least two reasons. First, if the rents lessees are currently paying and will continue to pay are as exorbitant as appellants claim, lessees will surely pay less in compensation for the ground land than they will pay in rent. And second, if the purchase price of ground land has become artificially high, as appellants also contend, then lessees will surely be able to take advantage of that price by selling both the ground land and the houses situate thereon. Hence, lessees plainly will receive a substantial pecuniary benefit from their condemnation of Trustees' property despite their payment of a compensation award. In fact, their efforts to acquire Trustees' land itself demonstrates that they certainly perceive the benefits of doing so.

[205] Prior to the date on which Chapter 516 became law, approximately 7,500 of Trustees' leases were in effect. Although the Act became law on June 24, 1967 (1967 Haw. Sess. Laws, Act 307, § 46), the effective date of the condemnation provisions, contained in Part II of the Act, here in issue, was postponed until July 1, 1969. *Id.*

[206] Trustees do not contend that leases executed after the enactment of Chapter 516 have been unconstitutionally impaired. *See Texaco, Inc.* v. *Short*, 454 U.S. at 531.

tinction between a taking and an impairment of vested contract rights, which had been premised on the special nature of eminent domain (*see* note 207, *infra*). In that event, the takings here must be treated in the same manner as a statute which both *adds* a purchase option to an outstanding lease and *subtracts* the lessor's reversionary interest and his damage remedy for the lessee's breach, a remedy otherwise retained by every contracting party in the state except those, like Trustees, who happen to be subject to the Act.

1. The threshold inquiry, whether Chapter 516 has substantially impaired Trustees' leases (*Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978)), has, as noted above, definitely been met.[207] The effect of the statute was immediate, permanent, and unavoidable; no grace period or other relief was accorded the lessor.[208] Nor had the field been previously subject to regulation; Chapter 516 chartered new and unexplored territory.[209]

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[207] The benefit given to the lessee eliminated the lessor's right to regain the premises at the end of the term. The value of the lessor's interest was also immediately affected. This detrimental reordering, *in advance of condemnation*, of vested rights and obligations under pre-existing lease contracts, transgresses the limits of the Contract Clause, whether or not the lease contract is ever in fact condemned. This consideration distinguishes the instant case from cases such as *Contributors to Pennsylvania Hospital* v. *Philadelphia*, 245 U.S. 20, 23-24 (1917), *Cincinnati* v. *Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912), and *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 691 (1897). In these cases, the contract was taken merely as an incident to condemnation of other tangible property, and no statute had impaired the contract prior to the actual condemnation itself. Nor is *Hays* v. *Port of Seattle*, 251 U.S. 233, 237-38 (1920), apposite, since the state was subject to suit for its breach of an existing contract. Here, the state has not afforded lessors a damages remedy.

[208] The statute applied to all leases "existing and in force on June 24, 1967" and retroactively abrogated all inconsistent provisions in these leases. Haw. Rev. Stat. § 516-61.

[209] Lack of a prior regulation bears upon the reasonable expectations of the aggrieved party. *Allied Structural Steel Co.*, 438 U.S. at 242 n.13, 249-250; *cf. Energy Reserves Group, Inc.* v. *Kansas*

The statute thus constitutes a severe and unexpected impairment of Trustees' pre-existing lease contracts.

2. As we have already shown, Chapter 516 does not "serve a legitimate public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977). The structure and purposes of the statute overwhelmingly serve only certain private lessees in derogation of the interests of a political minority of lessors.[210]

3. The statute was not a temporary measure to deal with a "broad and desperate emergency" situation, such as the Great Depression (*cf. Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 444-445 (1934)), justifying retroactive application of the statute. *Allied Structural Steel Co.*, 438 U.S. 248-249.[211] The Act is a permanent measure, applicable to many long-outstanding leases, and unjustified by any exigent conditions.[212]

Power & Light Co., 103 S. Ct. 697, 705, 706-708 (1983); *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940). While land reform bills had been introduced in the Hawaii Legislature prior to 1967, none had passed, and Trustees had no reason to expect that one would do so prior to the actual enactment of Act 307 in 1967.

[210] This is not a situation such as in *Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296, 2306 (1983), where the application of an oil and gas price pass-through prohibition was "incidental" to the primary purpose of protecting consumers from price increases. Chapter 516 was designed, like the pension law in *Allied Structural Steel Co.*, 438 U.S. at 247-249, directly to adjust the rights and liabilities of the contracting parties.

[211] While an emergency is no longer an essential justification, the lack of an emergency remains one of the factors to be assessed. *United States Trust Co.*, 431 U.S. at 24 n.19.

[212] Any contention that retroactive application was essential to stem a social emergency is belied both by the fact that the effective date of the statute's condemnation provisions was postponed for two years (1967 Haw. Sess. Laws, Act 307, § 46), and by the fact that these provisions lay dormant and unutilized for some years thereafter (1975 Haw. Sess. Laws, Act 186, § 1; HHA JS App. A152).

4. The statute is not "of a character appropriate to the public purpose [assertedly] justifying its adoption." *United States Trust Co.*, 431 U.S. at 22. The statute may be employed only by persons leasing lots in tracts of five acres or more, who meet the statutory qualifications, who are financially able and desirous of obtaining title, and who have initiated the "takings" proceedings. These limited takings will not change any "pattern of ownership." These lessees are, moreover, free to impose the same restraints after acquisition of fee title, by becoming landlords themselves and leasing long-term to others. And after transfer of fee title, existing regulatory measures will no longer bind the lots, leaving the lessees free to sell, rent, or lease the land at whatever prices, times, and manner they desire.

5. The means chosen are "without moderation or reason [and] in a spirit of oppression." *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935).[213] The legislature selected the drastic retroactive mechanism of "taking" pre-existing leases, rather than resort to its wholly prospective regulatory power to accomplish its alleged objectives.[214] Since no grace period or other ameliorative

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[213] *See also United States Trust Co.*, 431 U.S. at 28-31; *Allied Structural Steel Co.*, 438 U.S. at 250-251.

[214] Regulatory measures, limiting rents and lease terms, could have alleviated the state's economic concerns. Many such measures were in existence, and still others have been subsequently enacted (*see* note 182, *supra*). The state could also have made available some of its vast landholdings for fee simple residential use, or relaxed current state zoning limitations restricting the great bulk of land to agriculture or conservation uses (*see* notes 188-190, *supra*). The state similarly could have avoided impairment of existing lease contracts by condemning vacant lands for public use. Finally, the state could have made Chapter 516 prospective, as Maryland has consistently done in enacting laws permitting redemption of leases. *See Flook* v. *Hunting*, 76 Md. 178, 24 A. 670, 671 (1892); *Marburg* v. *Mercantile Building Co.*, 154 Md. 488, 140 A. at 839; *Trustees of Sheppard & Enoch Pratt Hospital* v. *Swift & Co.*, 178 Md. 200, 13 A.2d 174, 178 (1940). The existence of these less drastic alternatives is relevant to the Contract Clause issue. *United States Trust Co.*, 431 U.S. at 29-31.

provisions were incorporated, a lessor who leased a residential lot prior to enactment is unavoidably subjected to potential loss of his fee title, contrary to otherwise wholly reasonable expectations.[215]

CONCLUSION

No amount of legislative "findings" can disguise the fact that what is involved in this case is a naked taking of private property for private use. Unless the Public Use requirement is to be read out of the Constitution—which is clearly what appellants seek—the judgment of the Court of Appeals should be affirmed.

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[215] The taking power itself is also exercised in an arbitrary and oppressive manner. The statute now permits taking of only some of the lots within a designated development tract. *See* Haw. Rev. Stat. § 516-22, as amended by 1975 Haw. Sess. Laws, Act 184 § 2(6), to permit acquisition of "all or a portion of" a development tract. The resultant random "checkerboarding" in each tract will damage—in effect, "take"—property rights in the remaining lots in the tract. The lessor will incur increased administrative costs in administering the non-homogenous tract, and the non-acquiring lessees will be deprived of the benefits from the protective and custodial services which lessors customarily furnish.

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HAWAII HOUSING AUTHORITY, ET AL.,
Appellants,

v.

FRANK E. MIDKIFF, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 83-141

In the
Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, ET AL.,
Appellants,

v.

FRANK E. MIDKIFF, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Appellants

Summary of Argument

Appellees' Brief demonstrates, more clearly than ever, that affirming the decision below would unleash federal courts to engage in unprecedented usurpation of both the legislative and the judicial functions of state governments that decide to employ their taking power to achieve broadly beneficial public ends.

Argument

I. The Ninth Circuit's Invalidation of Hawaii's Land Reform Act Impermissibly Usurped State Legislative Power.

Appellees labor long to establish a proposition appellants have never denied: namely, that the Constitution forbids even a compensated taking of property when executed "simply,"[1] "purely,"[2] "wholly,"[3] "exclusive[ly]"[4] and "for no reason other than"[5] to confer private benefit on private parties. Any such purely private taking would, of course, be struck down under the minimum rationality test mandated by all relevant twentieth-century precedent.[6] For such a purely private taking — one that created no public gain, benefit, or advantage — would serve no legitimate purpose of government, and would thus be void.

No such purely private taking, however, is involved in this case. The Hawaii Land Reform Act was designed by the state legislature not to benefit a particular class of identifiable individuals,[7] but rather — by bringing about compensated

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[1] Appellees' Brief at 47 n.129, 49, 51.

[2] *Id.* at 40, 45 n.125.

[3] *Id.* at 44, 45 n.126, 49.

[4] *Id.* at 40, 42.

[5] *Id.* at 40.

[6] *See* Brief for Appellants in Nos. 83-141 & 83-283 (hereinafter, "HHA Brief") at 24-32.

[7] As appellees repeatedly observe, landlots taken by the State pursuant to the Act may subsequently be leased or sold — by tenants who purchase from the State or indeed by the State itself — to parties other than the existing tenants. *See, e.g.*, Appellees' Brief at 71 & n.177, 72-73. Although appellees assert that this somehow makes the Act less "public" in purpose, it in fact only underscores that the Act favors *no* definable "private" group. *See also* Jurisdictional Statement in No. 83-141, at 22-23.

transfers of residential land long concentrated in the hands of a few landlords — to increase the alienability of real property, to broaden opportunities for residential land ownership, to mitigate the oligopolistic power of a small group of landowners, and to stabilize the Hawaiian economy.[8] Appellees nowhere deny that these are classic *public* purposes, of a sort pursued by legislatures and endorsed by courts throughout American history.[9] Rather, appellees claim that these purposes either are not genuinely embodied in the Act, or cannot effectively be achieved by the Act.[10] Not only are both claims groundless, but acceptance of the strict scrutiny on which they depend would plunge this Court into a swamp it decisively abandoned nearly half a century ago.

First, appellees flatly deny that the Act was intended "to diminish the 'concentration' of land ownership."[11] This assertion is little short of astonishing, for the Act rests centrally on just such an "antitrust predicate."[12] Indeed, few legislative findings could have been more expressly and repeatedly articulated in the text of the Act and its amendments than the findings that land ownership in Hawaii was excessively concentrated in the hands of a few[13]; that the market in residential property was seriously distorted by that small group's refusal to sell rather than lease, even in the face of rapidly rising demand[14]; and that legislation was necessary to correct

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[8] *See* HHA Brief at 1-6.

[9] *See id.* at 16-24.

[10] *See* Appellees' Brief at 66-75.

[11] *Id.* at 73; *see id.* at 12 n.42, 28 n.77, 73 n.183.

[12] *See id.* at 28 n.77.

[13] *See, e.g.*, Act 307 § 1(c) (A141-42); Act 184 § 1(a) (A144); Act 185 § 1 (A147-48); Act 186 § 2(a)(1)-(3) (A152-53). *See also* HHA Brief at 2 & n.4.

[14] *See, e.g.*, Act 307 § 1(e)-(g) (A142-43); Act 184 § 1(d) (A145); Act 186 § 2(a)(2)-(4) (A153). *See also* HHA Brief at 2-3.

this market failure, to create a more competitive residential property market, and thus to check inflation in land prices, rents and the cost of living generally.[15] The Act's antitrust purposes are thus plain on its face.[16] The Act's legislative history,[17] moreover, furnishes ample additional evidence of those purposes.[18] Finally, even if those purposes had not so plainly motivated the Hawaii legislature, this Court has long since abandoned the practice of voiding socioeconomic legislation simply because its legitimate aims had to be judicially surmised in the face of doubts about the legislature's actual purpose.[19]

Second, appellees advance an opinion that, in their view, the Act may not be effective in achieving its stated goals of dispersing residential land ownership, reducing inflation, and

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[15] *See, e.g.*, Act 307 § 1(h) & (j) (A143); Act 184 § 1(d) (A145); Act 185 § 1 (A147-51); Act 186 § 2(a)(2)-(7) & (9). *See also* HHA Brief at 4-5.

[16] Appellees' attempt to erase these purposes from the Act is futile. Appellees absurdly suggest that the Act can have no such purposes unless it explicitly invokes the term "monopoly" or "oligopoly." *See* Appellees' Brief at 12 n.42, 73 n.183. The legislature's repeated references to excessive concentration of land ownership and the need to disperse that concentration, however, can hardly be mistaken as anything other than references to "monopoly" or "oligopoly" and the need to break it up.

[17] *See* HHA Brief at 1 n.2, 3 nn.6 & 7, 4 n.10.

[18] The conference committee report accompanying the 1967 Act, for example, explicitly stated that the Act would check the landowners' "monopolistic advantage." *See id.* at 4 n.10. Appellees suggest that such clearly relevant contemporaneous legislative history must be wholly ignored unless its "loose language" is enacted verbatim by the legislature. *See* Appellees' Brief at 12 n.42. Appellees would thus reduce the judicial construction of statutes to a mechanical search for talismans incanted in their texts.

[19] *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 176-79 (1980); *id.* at 180-81 (Stevens, J., concurring in judgment); *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976) (per curiam); *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). Federal judicial surmise about the legislature's actual purposes would, however, be premature in this case, for there has been neither any federal judicial evidentiary hearing about those purposes, *see* n.39 *infra*, nor any opportunity for dispositive state-court construction of those purposes, *see* § III.B *infra*.

stabilizing the Hawaiian economy.[20] This view is demonstrably erroneous.[21] But more important, it is utterly irrelevant to proper judicial review of the Act under a public-use challenge. For this Court has decisively held that federal courts must give "well-nigh conclusive" deference to any minimally rational legislative finding that a compensated governmental taking will serve a public purpose. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). Debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic measures[22] — have thus long been banished from federal courts and relegated solely to legislatures.[23] Appellees nonetheless beckon this Court into precisely such a debate.

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[20] *See* Appellees' Brief at 71-72, 73, 74-75.

[21] Appellees assert, for example, that "the legislature's finding that the transfers of title [under the Act] will combat inflation is baseless," because the Act will not directly increase the physical supply of land lots. *Id.* at 71. This argument, however, assumes a normally functioning, competitive market in land — a kind of market which, as the legislature expressly found, has long been absent in Hawaii because of the major landowners' oligopolistic concentration and the strong federal tax deterrents to sale of their land. *See* HHA Brief at 3 & nn. 6, 7. Because land prices have been artifically inflated in this distorted and noncompetitive market, it was entirely rational for the legislature to conclude that breaking up large landholdings — by inducing land sales at fair market value through a means that minimized sellers' tax liability — would help bring prices of residential lots in Hawaii down to competitive levels.

[22] *See id.* at 24-25 n.62, and cases cited therein.

[23] *Berman* v. *Parker's* announcement of the demise of *Lochner* in the takings area was hardly novel. Long before *Berman*, the First Circuit, for example, treated as settled the principle that a federal court must advance no view of its own about "the wisdom of the political [or economic] theory" underlying a taking that is challenged as not for public use. The court stated that "it is our duty to determine whether the [taking law] rested upon an arbitrary belief of the existence of the evils [it] was intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist" — *not* "'to consider whether all the statements of fact which may be the basis of the [legislature's] belief are well-founded,'" *nor* "'to weigh conflicting evidence.'" *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir.) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 286-87 (1932) (Brandeis, J., dissenting)), *cert. denied*, 329 U.S. 722 (1946).

What appellees are thus urging, as they indeed all but concede,[24] is that *Berman* v. *Parker* be overruled,[25] and that the public-use requirement trigger far closer scrutiny of fully compensated takings than that mandated for regulatory or tax measures under the Equal Protection Clause or the Due Process Clause — even though such measures commonly alter property rights and transfer relative economic advantage *without* compensation.[26] Appellees would carve out an anachronistic Lochnerian oasis for federal judicial intervention in the socioeconomic affairs of our States whenever they choose to employ their eminent domain power rather than their other regulatory, tax, or spending powers. In all the eighty-nine pages of their brief, however, appellees advance not a single twentieth-century decision, and not one plausible reason, suggesting why this should be so.[27]

Nor can the radical nature of appellees' proposal be concealed by the elaborate seven-factor test which appellees proffer for "objective[ly]" distinguishing permissibly "public"

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[24] *See* Appellees' Brief at 78-82. *See also id.* at 63 ("it is the prerogative and duty of the courts independently to scrutinize the realities of a proposed condemnation and to invalidate those failing to pass constitutional muster").

[25] Appellees do make a limp attempt to distinguish *Berman* v. *Parker* based on a list of specific factual features present in that case but not this one. *See id.* at 77-78. But this list entirely misses the core meaning of *Berman*. For *Berman* held that, so long as a taking is rationally related to public ends, its particular mechanisms and contours rest entirely "in the discretion of the legislative branch," *not* that of the federal courts. 348 U.S. at 36. It is thus not for courts to say whether takings would better occur on an "area" rather than on a "piecemeal" basis, or would best be implemented by "an agency of private enterprise" rather than by "a department of government." *Id.* at 34-35.

[26] *See* HHA Brief at 24-29 & nn.63-69, and cases cited therein.

[27] As appellants have already demonstrated, logic and precedent alike cut entirely the other way. *See id.* at 30-32.

from impermissibly "private" takings.[28] Contrary to appellees' wishful suggestion, such a "test" cannot in fact prevent judges who might employ it from "subjective[ly] second-guessing"[29] determinations about the public good that this Court has long held are properly left entirely to legislatures, not courts. For the factors listed in appellees' novel test cannot meaningfully distinguish takings for a "public" use from those for a "private" use, as even the briefest reflection makes clear.

Some of appellees' factors — for example, the "public payment" factor[30] and the "change in use" factor[31] — offer no guidance at all to whether a taking serves a public purpose. A governmentally financed taking of a productive factory for conversion to a house for a mayor's personal crony, for instance, would surely *change use* at *public* expense, but those facts would in no way indicate that the taking generated any justifying public advantage. Other factors — for example, the "public transferee" factor[32] and the "continuing control" factor[33] — offer at best highly unreliable guidance to whether a taking serves a public purpose. A taking of land for transfer to a *public* agency for construction and operation of a highway, for instance, can be deliberately deployed to confer *private* benefit upon an influential legislator's friend by raising

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[28] *See* Appellees' Brief at 54-58, 61. While appellees point to various cases in whose particular circumstances these factors happened to be present or absent, they identify no authority and offer no analysis suggesting that these factors should be determinative of the public-use issue.

[29] *See id.* at 61.

[30] *See id.* at 54-55 (factor (b)).

[31] *See id.* at 55 (factor (c)), 56-57 (factor (e)). This factor echoes the majority opinion below. *See* 702 F.2d at 794-95 (A13-14).

[32] *See* Appellees' Brief at 55-56 (factor (d)); *see also id.* at 54 (factor (a)). This factor too echoes the majority opinion. *See* 702 F.2d at 795 (A14-15).

[33] *See id.* at 57 (factor (f)); *see also id.* at 57-58 (factor (g)).

the value of land he owns adjacent to the chosen highway site; likewise, a taking of land for transfer to a *private* developer can be intentionally harnessed to *public* advantage by facilitating a redevelopment project that creates jobs and increases tax base.[34] Literal application of appellees' test in such circumstances would thus lead perversely to the invalidation of broadly beneficial takings but the survival of narrowly favoritistic ones. But deciding when to discount or disregard the test's criteria to avoid such anomalous results would simply enmesh courts in the very *legislative* inquiries about what constitutes the public good that appellees claimed it was the test's virtue to avoid.

Nor would a test turning on which sort of benefit from a taking — "public" or "private" — is "primary," and which is "incidental,"[35] avoid these problems. Such a test would require courts to discern all the various constituencies whose welfare a taking might improve, and then to rank their relative gains. But just as it is unimaginable that courts should decide who benefits more, for example, from a regulation limiting debt-adjusting to lawyers — the lawyers or the public; from a regulation limiting eyeglass refills to eye doctors — opthalmologists or the public; or from a regulation confining milk to non-plastic containers — the paperboard industry or the public,[36] so it is unimaginable that courts should decide who benefits more, for example, from a taking for a downtown development project — the developer's shareholders and partners, who enjoy greater profits, or the public, which enjoys increased employment and tax base; or from the Hawaii

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[34] *See generally* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 G.W.L.Rev. 355, 369-376 (1983) (private-transferee takings are no more likely to be improperly motivated or beyond public accountability than public-transferee takings).

[35] *See* Appellees' Brief at 50 n.134, 76 & n.192.

[36] *See generally* HHA Brief at 25-27 & nn.63-69, and cases cited therein.

Legislature's choice to employ compensated condemnations to end land oligopoly in Hawaii — the landowners, who receive fair market value plus a distinct federal tax benefit,[37] the current occupants, the ultimate purchasers, or the public, which gains increased access to full home ownership at fair prices.

In short, once it is recognized, as it must be, that *takings* for the public good, like *regulations* for the public good, often necessarily involve some identifiable quantum of private benefit,[38] then it is *only* the test that appellants urge — the minimum rationality test long mandated by this Court for *all* socioeconomic legislation — that can avoid such brazen judicial usurpation of the legislative function as that by the court below.[39] Nor can such usurpation be justified by appellees' unwarranted supposition that, without it, the power of eminent domain would freely swallow up rights of private property.[40] For the taking power, which is closely constrained by the judicially enforceable requirement of just compensation, is far less potent a means of redistributing wealth than

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[37] *See id.* at 3 nn.6-7.

[38] This is paradigmatically so in an antitrust context, where divestiture to *private* actors is the only way to achieve the *public* good of increased competition.

[39] The decision below thus should be reversed. But if the Court were to agree with appellees instead — and thus to hold that federal courts should revert to the long-abandoned role of actively re-evaluating legislative determinations that socioeconomic legislation will serve the public good — then not affirmance but remand would be appropriate. For the district court below upheld the Act's constitutionality on summary judgment without any factual hearing. If the federal courts are to be permitted to weigh conflicting evidence regarding the rationality of legislative determinations such as Hawaii's, then there must be an opportunity for both sides to present such evidence fully — an opportunity not yet had in this federal action.

[40] *See, e.g.*, Appellees' Brief at 42-49; *see also id.* at 58 (takings reviewable only for their rationality and the fairness of their compensation will have "no practical limit").

are uncompensated exercises of legislative taxing, spending, and regulatory power. Moreover, like all legislative power, the power of eminent domain is held in check by independent constitutional rights, such as those to fair hearing and to equal protection of the laws.[41]

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[41] Further doctrines for the protection of property against even fully compensated takings might surely be fashioned from the Constitution's requirements of due process — for example, in instances where property is too closely linked to one's "personhood," *see* Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 1005-06 (1982), or to the efficacy of one's political participation, *see* Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1112-13 (1981), for its taking to be made whole by just monetary compensation. But appellees fail utterly to explain why any such doctrine should be fashioned in this case. In sharp contrast to the hypothetical examples appellees conjure up, *see* Appellees' Brief at 58-60, the Hawaii Land Reform Act uproots no individuals or groups from their homes or communities. Moreover, the Act provides undisputedly fair monetary compensation for land held, in appellees' case, strictly for its investment value. Therefore, contrary to the suggestion of the Brief of Amicus Curiae the Office of Hawaiian Affairs, at 29, the Act does not in any way undermine the interests of appellees' Hawaiian beneficiaries in the continued support of charitable programs now funded by income from the land. For appellees have never suggested that equal income could not be earned on reinvestment of the compensation awards. Finally, even if certain Hawaiian lands were sacred to appellees' Hawaiian beneficiaries — as the Brief of Amici Curiae Queen Liliuokalani Trust *et al.* suggests at 8-9 — such a novel claim of special value could never justify facial invalidation of the entire Act. Such a claim, if acceptable at all, could at most underpin challenges to the propriety of, or the fairness of compensation for, particular takings under the Act as applied. Indeed, it would be more than ironic if the unique characteristics of Hawaii's heritage were to trigger special federal judicial interference in state legislative decisions about how best to accommodate the needs of Hawaii's people, rather than heighten federal judicial deference to those decisions as all relevant authorities command. *See, e.g., Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *Clark* v. *Nash*, 198 U.S. 361, 367 (1905); *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 162-63 (1896).

II. The Land Reform Act Violates Neither Due Process Nor the Contract Clause.

A. *Due Process.*

Analogizing to *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), appellees suggest that allowing lessees to initiate takings under the Act constitutes an unconstitutional delegation of power.[42] The Hawaii Land Reform Act, however, is fundamentally unlike the ordinances this Court invalidated in *Eubank* and *Roberge*.

For as this Court stressed in both *Eubank* and *Roberge*, the statutes struck down in those cases vested private individuals with final, unreviewable discretion to block certain exercises of their neighbors' property rights. *See Roberge*, 278 U.S. at 122; *Eubank*, 226 U.S. at 143. In contrast, the Act, far from authorizing lessees directly to appropriate the land on which they reside, merely enables them to trigger public hearings before a state agency — namely, the HHA. Before title can be transferred to the State, the HHA must determine that acquisition by the State would serve the Act's public purposes, a determination fully challengeable in subsequent judicial condemnation proceedings. The argument that such private triggering of statutory procedures unconstitutionally delegates power was emphatically rejected in *New Motor Vehicle Board* v. *Fox*, 439 U.S. 96, 108-09 (1978), where this Court noted that "[a]lmost any system of private or quasi-private law could be subject to the same objection." *Id.*[43]

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[42] *See* Appellees' Brief at 83-85.

[43] Moreover, unlike the statutes at issue in *Eubank* and *Roberge*, the Act authorizes private individuals to trigger proceedings serving broad public purposes, as discussed in § I *supra*. The ordinances invalidated in *Eubank* and *Roberge* had no such general purposes; indeed, this Court in *Roberge* distinguished the statute struck down there from that upheld in *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (1917), on precisely this

B. *Contract Impairment.*

Contrary to appellees' assertions,[44] the Land Reform Act is manifestly compatible with the Contract Clause. The decisive difference between this Act and the statutes invalidated in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1974), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), is that this Act provides full compensation to those whose contractual rights it impairs. As this Court has consistently recognized, "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *Id.* at 19 n.16.[45]

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basis. *See Roberge*, 278 U.S. at 122; *Eubank*, 226 U.S. at 143-45. Hawaii's decision to permit lessees simply to pursue or forego the conditional opportunity the Act affords them to purchase the land they rent in no way offends due process.

[44] *See* Appellees' Brief at 85-89.

[45] The interruption of leases caused by the Hawaii Land Reform Act would not violate the Contract Clause even if it were uncompensated. For unlike the statute struck down in *United States Trust Co.*, the Act relieves contractual obligations only of private parties, not of the State, and therefore, even without compensation, would need to meet only the relaxed requirement that it be rationally related to a legitimate public purpose. *See Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697, 705-706 (1983); *United States Trust Co.*, 431 U.S. at 22-23. Moreover, in contrast to the "extremely narrow" statutory purpose found constitutionally illegitimate in *Allied Structural Steel*, the Land Reform Act, like the statute upheld in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), was "enacted to protect a broad societal interest rather than a narrow class." *Allied Structural Steel*, 438 U.S. at 247-49; *see also Energy Reserves Group*, 103 S. Ct. at 705 n.13. Finally, this case is "sharply distinguishable" from *United States Trust Co.* and *Allied Structural Steel* on grounds similar to those this Court found dispositive in *Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296 (1983): the contractual interruption caused by the Land Reform Act is not the Act's "sole effect" but rather is "incidental" to its primary goal of facilitating the passing of title. *Id.* at 2306-07.

III. The Ninth Circuit's Invalidation of the Land Reform Act Impermissibly Usurped State Judicial Power.

A. *Waiver of Abstention.*

Appellees' contention that the HHA appellants ("HHA") waived both *Pullman* and *Younger* abstention[46] is wholly without merit. *First*, appellees' astonishing assertion that HHA "failed to assert" and indeed "affirmatively argued" against *Pullman* abstention in this action[47] is flagrantly erroneous. To support this assertion, appellees inexplicably cite a supplemental brief filed in the court below not by HHA but by a group of intervenors.[48] In sharp contrast to those intervenors, however, HHA urged *Pullman* abstention in no uncertain terms in its supplemental brief in the court below,[49] as it had in the district court.[50] Moreover, even if HHA had not so plainly preserved its *Pullman* argument, this Court's power to order *Pullman* abstention to avoid premature, unnecessary, or indiscriminate facial invalidation by federal courts of state legislation is not subject to veto by a party even if waiver is explicit and intentional.[51]

Second, appellees are similarly mistaken in asserting that HHA waived *Younger* abstention. Contrary to appellees' characterization,[52] HHA's answer was not limited to *Pullman*

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[46] *See* Appellees' Brief at 25, 30-32.

[47] *See id.* at 25.

[48] *See id.* (citing JA122-25).

[49] *See* JA135-36.

[50] *See* JA64 (HHA answer), 82-86 (HHA response to motion for preliminary injunction).

[51] *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 379 n.5 (1978); *Procunier* v. *Martinez*, 416 U.S. 396, 400-01 (1974); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). Indeed, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 476-77 (1977), this Court considered whether to order *Pullman* abstention even though the sole proponent was a private amicus.

[52] *See* Appellees' Brief at 15-16 & n.58.

abstention.[53] Nor did HHA argue against *Younger* abstention in the court below, as appellees erroneously assert.[54] In any event, this Court has made clear that it will rule on an argument for *Younger* abstention on its merits even when it has not been raised below.[55]

In light of the fact that HHA thus plainly asserted its abstention claims in both the district court and the court below — which reached them on their *merits* — appellees' assertion that HHA purposely withheld its abstention claims in order to "toy with," "gambol" with, or "'sandbag[ ]'" the courts[56] is frivolous.

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[53] HHA's abstention defense rested rather on the general ground that a state-court construction might avoid the necessity for deciding constitutional issues. *See* JA64. This ground supports *Younger* as well as *Pullman* abstention. *See Moore* v. *Sims*, 442 U.S. 415, 428 (1979).

[54] *See* Appellees' Brief at 30-31. In fact, HHA expressly invoked *Younger* and *urged* abstention on the ground that, as in *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), "important state policies" were implicated by the Land Reform Act. *See* JA135. HHA should not be penalized for its candor in suggesting that application of *Younger* to this action would require extension of *Younger's* progeny. *See id.* Nor should HHA be penalized for a mistake of fact that led it to assert that no state condemnation proceedings had begun before proceedings of substance on the merits in the federal court so as to trigger abstention — namely, its statement that the first relevant condemnation action was filed on January 30, 1980. *See* JA134. For in fact, as appellees themselves point out, the first condemnation suit against appellees' property was filed on September 21, 1979, *see* Appellees' Brief at 35, which was before, not after, the district court had heard — no less decided — the first motion for partial summary judgment against appellees. Finally, HHA should not be penalized for not arguing below that designation proceedings, not in-court condemnation proceedings, triggered abstention. *See* HHA Brief at 44. For its supplemental brief was filed over seven months before this Court's decision in *Middlesex Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), illuminated this ground for *Younger* abstention.

[55] *See, e.g., Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977); *Zablocki* v. *Redhail*, 434 U.S. at 379 n.5. Only when a state has refused to assert *Younger* before *this* Court has the Court decided to ignore that ground for abstention. *See, e.g., Ohio Bureau* v. *Hodory*, 431 U.S. at 479-80. That was precisely the situation in all the cases cited in Appellees' Brief at 30 n.83, but clearly is not the case here.

[56] *See* Appellees' Brief at 32-33.

B. *Pullman Abstention.*

Appellees have but one retort to HHA's argument for *Pullman* abstention to permit state-court construction of the Land Reform Act — namely, that this federal action involves no unsettled question of state law.[57] But, as appellees' brief itself makes abundantly clear, a dispute over what purposes the Act was designed to serve lies at the very heart of this case: appellees allege that the Act was not in fact designed to achieve the public purposes stated on its face, but rather that its true objective is simply to satisfy private desires.[58] If it is not clear beyond doubt that the true objective of the Act is in fact to serve the antitrust purposes it plainly articulates,[59] then surely it is for the *state* courts to say, at least in the first instance, what purposes the state legislature *was* trying to achieve through the Act.[60] For there can be no doubt that what the objectives of a statute are, no less than how the statute is intended to operate, is a question of state law.[61] And any federal decision to invalidate the Act for serving no public

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[57] *See id.* at 26.

[58] *See, e.g., id.* at 3, 7, 12, 52-53, 68, 75. This view, of course, was shared by the court below, which brushed off the Act's stated public purposes as "mere rationalizations." *See* 702 F.2d at 798 (A21).

[59] *See* HHA Brief at 16-23; *see also* § I *supra*.

[60] Appellees suggest that any such state-court construction would require "adding provisions [to the Act] that the state legislature omitted." Appellees' Brief at 27. This would be true, of course, only if one agreed with appellees and the court below that all the public purposes plainly embodied in the Act had at the outset to be stripped away. In any event, appellees offer no reason why Hawaii cannot empower its courts to play an active role in its law-making process. *See* HHA Brief at 39 n.83.

[61] The aims and history of the Act are no less "susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question," *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973), than were the intent of the criminal sanctions and the purpose of the restrictions on consumer publicity and secondary product boycotts in the Arizona Farm Labor Statute that prompted the Court to order abstention in *Babbitt* v. *Farm Workers*, 442 U.S. 289, 307-12 (1979).

purpose before the state courts have had an opportunity to elaborate its purposes not only threatens indiscriminate intrusion in state programs, but also may be purely advisory.[62]

In short, the sweeping breadth of appellees' facial challenge,[63] which rests on a most tenuous reading of the Act that insultingly impugns the Hawaii Legislature's integrity,[64] and which would dismantle at a blow an entire statutory framework for achieving the broad-ranging goals evinced by the Act's terms and history,[65] combine to make abstention

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[62] If the state courts, for example, conclude that the Act's purposes are to create a more competitive market in residential property and so combat inflation — purposes appellees virtually concede would be permissibly public if genuinely intended by the Act, *see* Appellees' Brief at 71-75 — appellees' facial challenge to the Act might be withdrawn, or at least substantially modified. Thus state-court resolution of the Act's purposes could indeed "avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs* v. *Moore*, 420 U.S. 77, 83 (1975). And should appellees challenge that state judicial determination as rendered in bad faith, nothing would preclude them from seeking its reversal in this Court.

[63] As this Court has noted, the dangers of unnecessary and precipitous disruption of important state programs — through federal constitutional rulings predicated on merely advisory readings of state statutes — "increases with the breadth of the challenge." *Moore* v. *Sims*, 442 U.S. at 428. Thus it is not remarkable but entirely appropriate that, absent some compelling countervailing interests such as the First Amendment freedoms at stake in *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964), broad facial challenges give way to abstention.

[64] Appellees' and the circuit court's dismissal of the elaborate legislative findings in this case as mere "rationalizations" masking private purposes amounts to an unsupported and demeaning assault on the good faith of the Hawaii Legislature, and calls for a novel and unacceptable federal inquiry into state legislative motive. *Cf. United States* v. *O'Brien*, 391 U.S. 367 (1968) (inquiry by coordinate branch).

[65] Thus the "equitable considerations" invoked by appellees in fact cut entirely in appellants' favor. *See* Appellees' Brief at 28 n.78. Here, unlike in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 329, there is a distinct danger of "disruption of an entire legislative scheme of regulation." On the other hand, there is in this case no danger of irremediable damage to First Amendment rights such as those involved in the cases appellees cite, *see* Appellees' Brief at 28 n.78, or to any comparable right, given the State's pledge not to transfer title pending resolution of the issues in this case.

especially appropriate in this case. Moreover, not only is this a case involving matters "peculiarly within the province of the state courts," but there is also already an "action pending in state court that will likely resolve the state-law questions underlying the federal claim." *See Harris County Commissioners* v. *Moore*, 420 U.S. 77, 87 (1975).[66] Finally, abstention would be appropriate here even if there were no dispute over the purposes of the Act raising unsettled questions of state law, for here, "the nub of the whole controversy may be the state constitution." *See id.* at 85; *see also Reetz* v. *Bozanich*, 397 U.S. 82 (1970). Contrary to appellees' assertion, the "public use" requirement of section 20 of the Hawaii Constitution is not a mere restatement of its federal counterpart, and might well be construed more stringently by the State's highest court.[67]

Accordingly, because the confrontation appellees would force between the state legislature and the federal judiciary is neither clearly defined nor unavoidable, abstention is justified to avoid the rush to judgment that appellees irresponsibly demand.

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[66] In *Hawaii Housing Authority* v. *Midkiff*, Civ. No. 63408 (Haw. 1st Cir. Sept. 6, 1983) (Grieg, J.), a full evidentiary hearing on the public-use issue has been completed. *See* HHA Brief at 11 & n.43. Appeal of Judge Grieg's decision upholding the Act to the Hawaii Supreme Court could speedily resolve the state-law questions and so avoid or alter the federal constitutional issues. Thus any delay entailed by abstention in this case would be slight. And appellees nowhere contest the adequacy of the state courts or suggest any prejudice against them there.

[67] *See Hawaii Housing Authority* v. *Castle*, 653 P.2d 781 (1982), in which the Hawaii Supreme Court not only discussed the federal and state public-use requirements separately, but remanded for an evidentiary hearing regarding the bases for the legislature's findings in the Act — a hearing involving far more probing scrutiny in state court than all relevant authority would have called for under the federal Constitution, *see* § I *supra*. Nor, in light of the already pending state adjudication, *see* note 66 *supra*, is the possibility that the Hawaii Supreme Court might invalidate or narrow the Act on state constitutional grounds "hypothetical," as appellees assert, *see* Appellees' Brief at 28.

C. *Younger Abstention.*

Appellees do not contest the applicability of *Younger* abstention to the civil context of the Land Reform Act, but simply deny that any state judicial proceeding was commenced against them early enough to trigger such abstention. They are in error.

First, appellees argue that some state proceedings, though indisputably judicial, were begun too late — namely, that condemnation actions filed by HHA in state court on September 21, 1979, began after actions of substance on the merits in the district court.[68] But, as appellees acknowledge, the only district court actions prior to that date were the issuance of a temporary restraining order and denial of a sweeping preliminary injunction against the Act urged by appellees on the public-use grounds at issue in this appeal.[69] Contrary to appellees' assertion, these actions were not more substantial on the merits of appellees' public-use challenge than were the preliminary proceedings held insufficient to bar abstention in *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975).[70]

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[68] *See id.* at 35, 37-38. While appellees also suggest that the condemnation suits filed on September 21, 1979, should count for nothing because they were "subsequently dismissed," *see id.* at 21 n.68, that fact cannot legitimate the district court's retention of jurisdiction during their pendency. In any event, the action involving Wai-Kahala Tract "C," Civ. No. 59202, was in fact pending in state court until January 21, 1981, well after the district court's entry of final judgment. *See* HHA Brief at 42-43.

[69] The district court's grant of a preliminary injunction concerning two provisions of the Act that related solely to compensation — *not* public use or the propriety of condemnation — is irrelevant. The filing in the district court of a partial summary judgment motion on September 18, 1979, is likewise of no consequence, for the court did not conduct a hearing on that motion until November 14, 1979, nor rule against appellees on that motion until December 19, 1979 — both well after the filing of the state condemnation actions. *See* JA16-18.

[70] *See* HHA Brief at 43 n.87. Appellees' attempt to distinguish *Hicks*, *see* Appellees' Brief at 37-38 n.102, twists the rule of that case beyond recognition. Had the Court agreed with appellees' characterization that the federal suit in *Hicks* was effectively "filed second, not first," *id.*, it would never have had to pose, much less decide, the question whether *Younger* applied "where

Second, appellees argue that other state proceedings — conducted by the HHA under the Act — were begun early enough[71] but were insufficiently judicial.[72] Appellees' reliance on section 516-51(b) of the Act for this proposition is misplaced. That section provides merely that private arbitration or negotiation of the amount of *compensation* not be considered part of a condemnation proceeding under the Act. It therefore has no bearing whatever on whether *public-use* determinations or designations by the HHA — wholly separate actions of a public agency — constitute a portion of condemnation proceedings under the Act, or even if they do not, whether they are judicial within the meaning of *Younger*. Nor is appellees' conclusory assertion that HHA proceedings lack judicial attributes in the least persuasive[73]; indeed, appellees'

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state . . . proceedings are begun . . . *after* the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." 422 U.S. at 349 (emphasis added). Moreover, appellees' reliance on *Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977), and *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), is misplaced, for neither case suggests that denial of a preliminary injunction constitutes an action of substance on the merits for purposes of the *Hicks* rule. Indeed, *Doran* would be analogous only if the district court had *granted* appellees' sweeping preliminary injunction motion so as directly to preclude the subsequent initiation of state condemnation proceedings which in fact took place here.

[71] As appellees concede, the HHA had determined after public hearing that the condemnation of lots in Wai-Kahala Tract "H" would serve a public use on October 20, 1978, well before the filing of the federal complaint. *See* Appellees' Brief at 20 n.67. Appellees nowhere deny that on that date, a condemnation action against them was in every real sense initiated. *See* HHA Brief at 44. Likewise before the filing of the federal action, on February 22, 1979, the HHA had conducted a public hearing to determine whether the condemnation of lots in Kamiloiki Valley would serve a public use. *See* Appellees' Brief at 21 n.67. In appellees' own characterization, such determinations by the HHA would inexorably lead to condemnation. *See* Motion to Affirm in No. 83-236 at 2.

[72] *See* Appellees' Brief at 35-36.

[73] Contrary to appellees' contention, *see id.* at 36 & n.97, HHA proceedings, which involve elaborate evidentiary inquiry and fully open and

denial that the HHA provided a forum before which they could advance their constitutional objections to the Act is simply belied by their submissions treating it as exactly that.[74] In any event, were there any uncertainty whether HHA had the operational capacity to adjudicate constitutional claims, that would be a matter of state law, and would only heighten the need for *Pullman* abstention in this case.

Conclusion

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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adversarial hearings, are far closer to the disciplinary proceedings involved in *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), than to the summary ex parte actions that the Court found insufficient to trigger *Younger* in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (action by a building inspector), and *Fuentes* v. *Shevin*, 407 U.S. 61 (1972) (action by a court clerk).

[74] Appellees seek to trivialize their own submission to the HHA in the Kamiloiki proceeding as "merely designed to give HHA notice of Trustees' intention to have their constitutional claims adjudicated before a competent court." Appellees' Brief at 21 n.67. Quite on the contrary, however, their letter in no uncertain terms stated their Fifth and Fourteenth Amendment objections to the designation or condemnation of their tracts and concluded: "In light of the objections herein raised, the Trustees urge the Hawaii Housing Authority to decline to designate any portion of [the relevant tracts] for acquisition."

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No. 83-283

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

Kahala Community Association, Inc.
and Kahala Community Fee Purchase Fund,

Appellants,

vs.

Frank E. Midkiff, Richard Lyman, Jr.,
Hung Wo Ching, Matsuo Takabuki
and Myron B. Thompson, Trustees of
the Kamehameha Schools/Bishop Estate,

Appellees.

On Appeal From the United States
Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY BRIEF

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Appellees.

APPELLANTS' REPLY BRIEF

SUMMARY OF ARGUMENT

The Kahala Community Assn., Inc., et al. ("Kahala"),[1] Appellants in No. 83-283, adopt

[1]Counsel of Record for Appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund also represent the following

the Reply Brief of the Hawaii Housing Authority, et al., Appellants in No. 83-141. Kahala's sole purpose in this brief is to reply specifically to the arguments of Amici Curiae The Office of Hawaiian Affairs ("OHA") and Queen Liliuokalani Trust, et al. ("QLT") (collectively "Amici") set forth in their briefs in support of Appellees Frank E. Midkiff, et al. in Nos. 83-141, 83-236 and 83-283.

Amici, purporting to speak for the Native Hawaiian population of Hawaii, cast the Hawaii Land Reform Act ("Act")[2] not as the informed, compromise legislative solution to a multi-faceted social problem which it

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[1] (cont'd) community associations in matters relating to the Hawaii Land Reform Act: Lunalilo Park, Kaonohi Ridge, Waialae Nui Valley, Waialae Nui Ridge, Ainakoa, Haiku Park, Crown Haiku, Waialae Iki, and Enchanted Lakes.

[2] Hawaii Rev. Stat. ch. 516 (Appendix to Jurisdictional Statement in No. 83-141, pp. 109-140).

is, but as no more than an act of legislative tunnel vision directed specifically against Native Hawaiians. Not only are Amici's claims to the legitimate representation of Native Hawaiians belied by, inter alia, the brief of Amicus Curiae The Hou Hawaiians, et al. ("The Hou Hawaiians") in No. 83-141, but the very bases for Amici's distorted view of that legislative process are factually unsupportable.

Even were those premises correct, the conclusion which Amici urge--that the Act should fail because it might have a negative impact on some Native Hawaiians--is not relevant to the questions before this Court. The proper forum for the debate into which Amici entice this Court was, is and should continue to be that legislative process.

ARGUMENT

A. Amici's Argument that the Hawaii Land Reform Act Should Be Struck Down Because of Its Possible Negative Effect on Some Native Hawaiians is Based On Wholly Erroneous Assumptions.

In essence, Amici ask this Court to view the Act and its legislative evolution as an uninformed endeavor intended only to harm Native Hawaiians. The progression of their argument to this incorrect conclusion is based upon the following assertions: (1) that the same historical developments which resulted in the extreme centralization of land ownership in Hawaii also dispossessed Native Hawaiians from their lands; (2) that their dispossession has resulted in problems for Native Hawaiians to which government is unresponsive; (3) that the Act was directed solely at the further divestiture of what are

the last "Native Hawaiian" landholdings, those of Appellees Frank E. Midkiff, et al. ("Trustees"); (4) that Trustees and others representing the interests of both large landowners and Native Hawaiians were precluded from effective participation in the long political process that led to passage of the Act; and (5) that implementation of the Act will cripple Trustees' ability to provide financial support to the Kamehameha Schools which educate some Native Hawaiians.

The historical evolution of land ownership in Hawaii is not in dispute; its end result is the very reason for the Act. Similarly, there is no dispute that Trustees are the trustees of a trust estate ("Bishop Estate") which is the largest private landowner in the State and that they devote the net income of the Bishop Estate to the support

of the Kamehameha Schools.[3] But any factual support for Amici's premises ends here.

1. Trustees are not the sole providers of benefits to Native Hawaiians, nor may Trustees return their vast landholdings to Native Hawaiians.

Again, there is no disputing either Trustees' status as the largest private landowner in the State with approximately 341,500 acres[4] or Trustees' use of trust

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[3]The will which created the Bishop Estate provided that the Estate shall be devoted to the establishment and support of a school "for the children of Hawaii." The Trustees and their predecessors have interpreted this to mean children who have some degree of Hawaiian blood. This limiting interpretation has not been challenged to date.

[4]Hawaii Housing Authority v. Midkiff, et al., Civil No. 83408 (Haw. Cir. Ct., Sept. 6, 1983) ("Kamiloiki Valley Case"), Finding of Fact ("FoF") 129, reprinted in Appendix to Brief on the Merits of Portlock Community Assn., et al., Appellants in No. 83-236 ("Portlock Appendix"), at p. A-88. The

income to support schools which serve Native Hawaiians.[5]

But the Bishop Estate cannot be portrayed as the only remaining significant "Native Hawaiian" landholding of benefit to Native Hawaiians. For not only are the Trustees' landholdings not available for direct distribution to Native Hawaiians under the provisions of the will, but other major sources of land exist for the direct benefit of that segment of the Hawaiian population.

The Hawaiian Home Lands, for example, are some 200,000 acres set aside by the United States Congress in the Hawaiian Homes Commission Act of 1920[6] for the immediate

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[4] (con'd) Bishop Estate has been estimated to have a total value of some $2-3 billion dollars. See Portlock Appendix, FoF 134, p. A-89.

[5] See Portlock Appendix, p. A-25.

[6] 42 Stat. 108 (1921).

use of and eventual direct distribution to Native Hawaiians.[7] And potentially even more beneficial to Native Hawaiians are the so-called "ceded lands" created in the Hawaii Admission Act.[8] Specifically, Section 5 of

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[7]The Act and its workings are fully described in the Brief of Amicus Curiae The Hou Hawaiians ("Hou Brief") filed in No. 83-141, at pp. 22-31.

The Hou Hawaiians states in that brief that it "advocates and represents the interests of the approximately 8,000 Native Hawaiian applicants for Hawaiian homestead lands . . . ." (Hou Brief, p. 1.) While it purports to "take no position respecting affirmance or reversal of the decision below," id. at p. 2, it later states that:

> Native Hawaiians believe that this Court's recognition of the desirability of distribution of land held in the iron grip of large holders, and of the principle that the social utility of such distribution confirms the constitutionality of legislation providing for it, will provide impetus to more rapid distribution to Native Hawaiians of homesteads under the Hawaiian Homes Commission Act.

Id. at p. 36.

[8]Pub.L.No. 86-3, 73 Stat. 4 (1959).

that Act provides in essence that the United States shall grant to the State of Hawaii all lands it owned immediately prior to the State's admission into the Union, except for such of its lands as it shall reserve unto itself. The section further states that any such lands granted together with the proceeds from their sale or other disposition and the income therefrom "shall be held by said State as a public trust for . . . [inter alia] the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended. . . ."

Moreover, if, as Amici urge, the problems of Native Hawaiians today arise largely from dispossession from their lands, they cannot be remedied by Trustees. The will under which Trustees operate does not permit direct distribution of the trust lands to Native Hawaiians. Rather, Trustees' policy has been to lease residential lands for income without

any restrictions on lessees' ethnic background.[9] The direct benefits that Bishop Estate can provide to Native Hawaiians is limited to the educational opportunities available to some through the Kamehameha Schools.

Under these circumstances, the best hope for a return of land to Native Hawaiians would appear to lie in the distribution of the Hawaiian Home Lands or in the Act itself. Its very objective, after all, is to broaden the availability of fee simple residential land ownership, regardless of the aspiring landowner's ethnic background. This basic fact is recognized by at least one Native Hawaiian group which supports the Act:

> If, as seems likely, the State sells the land condemned under the statute at Hawaii's presently inflated land prices, few Native

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[9] See generally Kamiloiki Valley Case, FoF 136-165 (Portlock Appendix, pp. A-89-A-97).

> Hawaiians will be in a position to purchase. Nevertheless, the Native Hawaiians hope that the condemnation and distribution of properties under the Act will relieve the pressure on land prices from more affluent non-Native Hawaiians who bid prices up because of the shortage of residential land for sale.[18]

Finally, Amici's emphasis on Bishop Estate's importance to the Native Hawaiian community implies that Native Hawaiians have only the Estate to look to for support and that government has been wholly unresponsive to the particular needs of that segment of the community. One has only to skim Amici's table of authorities, which cite numerous governmental reports and enactments regarding Native Hawaiians, to see the fallacy of this presumption. And the responsiveness of the Act itself to the fee ownership desires of

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[18]Hou Brief, p. 35.

Hawaii's people including Native Hawaiians cannot be overlooked.[11]

2. The Act makes no distinction among lessors according to their use of lease revenues and is equally indifferent in application to the economic status of lessees.

The emphasis by Amici on the benefits of the Kamehameha Schools to Native Hawaiians

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[11]Amicus OHA, while disputing that Native Hawaiians are among the beneficiaries of the Act, suggests that the exercise of the power of eminent domain as set forth in the Act would be for a public purpose and thus constitutional "[i]f the roles [of Bishop Estate/ Native Hawaiians as lessors and of presumably largely non-native Hawaiians as lessees] were somehow reversed." OHA Brief, p. 29. Whether the legislature should exercise its condemnation power to redistribute land to Native Hawaiians is for the political process to decide. But Amici may not argue with any consistency that the State's condemnation power could be constitutionally used to redistribute lands to native Hawaiians yet be constitutionally infirm when addressed to problems caused by the residential leasehold system of the large landowners.

implies that the Act was intended to affect Bishop Estate not because it is a residential lessor but because it is a provider for the Native Hawaiians. But a review of the Act and of those landowners potentially or actually affected by it demonstrates that this is false.

First of all, the Act itself contains no provisions which distinguish landowners by any yardstick other than the quantity and contiguity of land ownership. It applies equally to landowners that engage in the practice of long-term residential leasing and is utterly unconcerned with where their lease rent or condemnation proceeds go.

Nor is there any such distinction in its potential application. For example, of the six largest private landowners on Oahu in 1964, only one, the Bishop Estate, was devoted to benefitting Native Hawaiians;[12]

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[12]See Kamiloiki Valley Case, FoF 70 (Portlock Appendix, p. A-66)

the other five were either corporations for profit or private beneficiary estates. And in actual application, the Act has been utilized to pursue the condemnation of the residential leaseholds of a variety of landowners.[13]

Just as the Act makes no distinctions among residential lessors according to the use to which they put their land and proceeds, so is there no provision in the Act which supports Amici's assertion that "[o]nly the rich, not the poor, will be served by this statute."[14] And not only does that

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[13] See, e.g.: HHA v. Richard Q. Y. Wong, et al., Civil No. 60220 (Haw. Cir. Ct. Jan. 9, 1980); HHA v. Violet Gaspar, et al., Civil No. 61322 (Haw. Cir. Ct. April 30, 1980); HHA v. Kalama Land Co., Ltd., Civil No. 61382 (Haw. Cir. Ct. May 7, 1980); and HHA v. James C. Castle, et al., Civil No. 62181 (Haw. Cir. Ct. July 18, 1980).

[14] QLT Brief, pp. 17-18. See also OHA Brief, p. 29, and Trustees' Brief, p. 68 n. 169.

statement demonstrate an unfamiliarity with the Act's workings, but it illustrates Amici's and Appellees' total misperception of the Act's purpose.

Amici and Appellees arrive at this conclusion by first stating that "[t]he majority of the Trust's lots impacted by this statute are in eastern suburban Honolulu[,]" and then utilizing 1980 Census records to characterize the residents of that general area as high-income.[15] No doubt some areas of "eastern suburban Honolulu" are among the most desirable residential lands in the City. But the following statements are also true: (1) "eastern suburban Honolulu" also includes lower middle class residential areas and is certainly not the paradise Amici would have it; (2) a great number of Bishop Estate's lots subject to condemnation under the Act

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[15]QLT Brief, p. 17.

are located in other, much poorer areas of the State;[16] (3) the act is not restricted in its applicaton to any particular lessor, and there are a great number of residential lessors who lease lots subject to condemnation under the Act in other, much poorer areas of the State; and (4) most importantly, the Act itself makes no distinctions in lessee eligibility according to income level. In summary, the lessees affected by the residential leasehold system and the Act are largely Hawaii's middle class which consists of people from all ethnic backgrounds including Native Hawaiians.

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[16]As one illustration, using Amici's methodology, the residential leaseholds at issue in the condemnation action of Hawaii Housing Authority v. Midkiff, Civil No. 64990 (Haw. Cir. Ct. March 27, 1981) are owned by Bishop Estate and located in western suburban Honolulu. They are included in census tract 78.02, the median household income in which tract, according to the 1980 Census, was only $23,332. U.S. Department of Commerce, Bureau of the Census, Census of Population and Housing, 1980 Table P-11, PHC 80-2-183.

In any event, there is a fatal flaw in Amici's logic. If the American dream of owning one's own home is alive in Hawaii as the legislature perceived it was, existing homeowner/lessees will by definition be largely the middle class. It was one of the legislature's precise objectives in passing the Act to make available the benefits of home and residential land ownership to a broader spectrum of society. To view the Act as no more than a private bill for the richest non-landowning citizens of Hawaii is to demonstrate the same tunnel vision Amici suggest the legislature applied in enacting the measure.

3. Trustees and others with vested interests in the Act's evolution enjoyed full participation in the legislative process.

In alleging the Act's negative effect on Native Hawaiians, Amici imply that the views of Trustees, other large landowners and Native Hawaiians were not considered by the legislatures which enacted and amended the Act. This assumption is totally and completely wrong.

First, common sense dictates that an entity which is both the largest private landowner in the State and a provider of educational services to Native Hawaiians would have fully participated in the lengthy political process that led to the passage of the Act and subsequent amendments. And this becomes even more obvious when Bishop Estate's uniquely powerful role in Hawaiian politics is fully appreciated.[17]

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[17]"A legislator once called it 'Hawaii's other government.' Its the giant landowners, the Bishop Estate, and the jobs held by its

Nor does any discrepancy exist between what common sense and Trustees' position in Hawaiian politics indicate and what Trustees' actual role has been in the effort to solve Hawaii's residential leasehold problem. The legislative history of that effort for the period 1955 through 1975, for example, during which the legislature "drafted and passed successive pieces of legislation to investigate, determine possible solutions and to

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[17] (cont'd) five voting trustees are among the most desired and challenging in Hawaii." Bishop Estate: A Job at the Top, Honolulu Advertiser, April 25, 1982, at A-3, col. 1. "In Hawaii, only the government has more power and influence than the five-member board of trustees of the Bishop Estate." Tangled in Hawaiian Politics, Wealthy Estate Gains Strength, Raleigh, N.C. News & Observer, July 17, 1983, at A-18, col. 1. See also QLT Brief, at pp. 5-6 ("[Bishop Estate trustees are] appointed by a majority of the Justices of the Hawaii Supreme Court, who have exercised their discretion with care, selecting persons who were established leaders in the community." (emphasis added))

rectify these problems concerning residential leasehold land tenure, the concentration of landownership, the resulting inflation in land prices, the desire for people to own their houselots in fee simple, and the effect on the public's health and welfare[,]"[18] is chocked with communications, testimony and other legislative interaction involving Bishop Estate, other residential lessors and Native Hawaiian groups.[19]

And this participation was far from futile. In fact, legislative and executive

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[18]Kamiloiki Valley Case, FoF 16 (Portlock Appendix, p. A-27)

[19]See generally Kamiloiki Valley Case, FoF 15-56 (Portlock Appendix, pp. A-26 - A-60). In particular, see id.: FoF 17, p. A027 (1955 request to estates and other landowners to provide written statements to Legislative Reference Bureau regarding plans to comply with sense of Territorial Senate that fee simple landholdings be diversified); FoF 18 at p. A-31 (1959 committee report discussing Bishop Estate testimony on lease vs. fee sales); FoF 21, p. A-34 (Bishop Estate and

consideration of the Trustees' views and the perceived interests of the Bishop Estate's beneficiaries may have been the single most important factor in delaying and complicating

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[19] (cont'd) Campbell Estate 1959 testimony); FoF 22, p. A-35 (1959 landowner response to Senate questionnaire on land policies); FoF 24, p. A-35 (1959 large landowner response to House questionnaire on land policies); FoF 25, p. A-36 (1959 testimony from Territorial Council of Hawaiian Civic Clubs, presumed precursor to Association of Hawaiian Civic Clubs, Amicus Curiae herein, and from Bishop Estate); FoF 32, p. A-41 (1961 testimony of Bishop Estate and Campbell Estates); FoF 37, p. A-45 (1963 testimony of Bishop and Campbell Estates and others); FoF 39-40, pp. A-45 - A-46 (1967 testimony by Bishop Estate, Council of Hawaiian Organizations, QLT and others on effect of initial Hawaii Land Reform Act subsequent to enactment but prior to effective date of July 1969, purpose of delay being to "allow the Legislature to receive additional input from the community on the Act"); FoF 47, pp. A-46 - A-54 (1967 committee reports regarding meetings between members of legislature, Bishop Estate and other large landowners, and Internal Revenue Service regarding tax aspects of Hawaii Land Reform Act); FoF 51, p. A-57 (1975 testimony of Bishop Estate and other large landowners); and FoF 53, p. 57 (1975 testimony of large landowner Kaneohe Ranch).

the search for a solution to Hawaii's residential leasehold problem. Initially, for example, Trustees and their beneficiaries played a pivotal role in the effort that blocked passage of the Hawaiian version of the Maryland Land Bill in 1963.[20] When the Act was finally passed in its first version in 1967, the legislature accommodated the lessors' prime concern with leasehold condemnation: the tax treatment of condemnation proceeds.[21] And even after the Act's

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[20] See Trustees' Brief, p. 5 n. 13, and How Land Reform Came To Hawaii, Honolulu Star-Bulletin & Advertiser, March 11, 1984, at A4, col.7 ("There was heavy opposition [to the 'Maryland land bill'] by the large landowners, by big trusts, and by Hawaiians who saw the bill as a threat to the Bishop Estate.")

[21] See Kamiloiki Valley Case, FoF 42, p. A-46 - A-47 (April 1967 House committee report on committee meeting with "representatives from the Bishop Estate, the Campbell Estate and the Kaneohe Ranch Co. . . . [and] the Internal Revenue Service to discuss the possible adverse income tax consequences to lessor-landowners upon the sale of fee simple

1967 passage, it remained basically unenforced by the state administration for nearly a decade, largely due no doubt to continued political and legal effort by Trustees and their predecessors to obstruct any legislative solution to the residential leasehold problem.[22]

In conclusion, Trustees no doubt remain opposed to the means chosen by the legislature as the optimum solution to Hawaii's

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[21] (cont'd) title to the lessees under various bills before the Legislature"), FoF 43, p. A-47 ("To accommodate the large landowners who did not want to be taxed as dealers in real estate on the proceeds of the lots sold under Senate Bill 1128, the Senate redrafted Bill 1128 in accordance with the indications of the Internal Revenue Service to provide for condemnation in bulk"), and FoF 44, at pp. A-51 - A-52 (1967 Senate committee report on accommodation of large landowners' tax concerns).

[22] See Honolulu Star-Bulletin & Advertiser, March 11, 1984, supra, n. 18, at A4, col. 8.

residential leasehold problem. But their continued resistance certainly cannot be equated with their preclusion from the legislative process that brought that solution about. The views of the Trustees and their beneficiaries were pressed upon the legislature and the state administration at every opportunity; their input was a key ingredient in reaching the informed, compromise solution the Act represents.

4. The Act will not preclude but will facilitate Trustees' continued efforts on behalf of Native Hawaiians.

Considering Trustees' heretofore near-total flexibility in the management of the trust affairs, Amici's and Trustees' fear of a legislative mandate that they reorder their manner of doing business is somewhat understandable. The Act, however, does not hinder

their ability to provide fully for the beneficiaries of the Bishop Estate. If anything, the indications are strongly to the contrary.

This is perhaps best evidenced by examining the current and potential sources of Bishop Estate's income. In this regard, Amicus QLT correctly points out the following:

> [M]ore that 97% of . . . [Bishop Estate's] lands has been classified by the State Land Use Commission as conservation or agriculture lands [not subject to the Act] . . . [and] produce little revenue . . . . [T]he . . . [Estate's] sizeable annual income is mostly generated from that small portion of its lands (less than 3%) classified as urban [, which include] the residential subdivisions at which the statute here in issue is aimed, as well as resort and other commercial properties.[23]

This is intended as evidence that the loss of residential leasehold revenues would wreak havoc upon the Trustees' ability adequately to finance the Kamehameha Schools.

But the facts are that while the Estate's residential leasehold lands comprise 2.42% of

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[23]QLT Brief, p. 5.

its total landholdings and produce 25.17% of its lease rent, its commercial lands, to which the Act does not apply, comprise but 0.17% of its total landholdings yet produce a whopping 64.10% of its lease rent income.[24] Moreover, from an investment standpoint gross returns from residential leasehold are notoriously low while the expenses associated with thousands of single-family residential leases are unacceptably high. The exodus from residential leasehold by Hawaii's other large landowners is as much evidence of these economic factors and of the vehicle the Act provides to get out of these investments without adverse tax consequences as of the governmental policy against residential leasehold.

Nor are the potential benefits to the Estate and similarly situated entities

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[24]Kamiloiki Valley Case, FoF 131 and 132 (Portlock Appendix, p. A-88)

confined strictly to the financial. As one Native Hawaii organization perceives:

> The Estate's net income supports the Kamehameha Schools, whose policy is to accept children of Hawaiian blood as students, but its residential properties are leased almost entirely to non-Hawaiians. To the extent tht lessees presently make the Estate's Native Hawaiian beneficiaries scapegoats for their inability to purchase and for extraordinary high housing costs, the Land Reform Act's requirement that residential property be sold to lessees may lessen resentment against the Estate, its trustees (whose compensation from the Estate exceeds $200,000 each) and its Native Hawaiian beneficiaries.[25]

In either event, it is too easily forgotten that the specific means chosen by the Legislature to redress the ills of the residential leasehold system, at the specific urging of residential lessors such as Trustees, was the exercise of the power of eminent domain. Trustees and other residential lessors are therefore guaranteed

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[25]Hou Brief, p. 35, n. 17.

payment of just compensation upon condemnation without adverse tax consequences.[26]

In fact, it appears extremely doubtful that Amici or large landowners such as the Trustees would favor any alternative solution to the residential leasehold problem accomplished by uncompensated regulation under the police power. Amici themselves suggest no such solution nor any other constructive approach to the dilemma. In fact, a review of all briefs on file with an eye toward problem-solving leaves the definite impression that the Act does provide the optimum solution. And if that solution ever

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[26] While Amici acknowledge as much, their concern is whether a condemnee will thereby receive "the full value of its land."[23] But Appellee Trustees voiced no specific concerns with the Act's valuation provisions on appeal, nor would acceptance of Amici QLT's views on what constitutes just compensation be consistent with any relevant federal and state precedent on the subject.

becomes no longer optional because of changed circumstances, there is absolutely no reason why Trustees or anyone else may not seek the legislature's alteration of the balance it has struck.

In conclusion, it is worth asking why, if the adverse economics of residential leasehold for the lessor and the serious social problems for the community are so clear, do Trustees resist the opportunity to sell under the Act's favorable tax treatment and instead attack its constitutionality? The answer may lie in Trustees' confidence that even if the Act is struck down they, unlike other large private landowners, may still obtain an Internal Revenue Service ruling allowing them to sell without adverse tax consequences because theirs is a charitable trust. They could then capitalize on lessees' strong desire to own the land under their homes by selling in what is really a

closed market situation at prices much higher than the fair market value that would be received by condemnation pursuant to the Act.[27] If the Act were struck down, it is,

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[27]A very strong indication that this is Trustees' policy is revealed in the Report of the Master on the Petition of the Trustees of the 97th Annual Report, Probate No. 2048 (Haw. Cir. Ct. December 6, 1983). As reported by the Master:

> Your Master inquired into the need for challenging the constitutionality of the Land Reform Act by the Trustees while they are still pursuing a policy of selling their residential lands. It was pointed out to your Master that the Act virtually eliminated the Trustees option of selling the Estate's residential lands at what would be considered a more favorable time to sell the lands in question; that the Trustees could probably obtain a sales price closer to the actual market value of the lands were they not forced to sell such lands. It should be noted that jury verdicts in valuation of real property generally tend to be the difference between the condemning authority's valuation and the land owner's valuation. The significance of selling their residential lands at a

of course, debatable whether (a) Trustees would sell at all, and (b) if they did sell, whether they would limit the "premium" to the $60 million discussed in the Master's Report,[28] and whether the result of their sales would be a financial killing at the expense of Hawaii's middle class or a social revolution that would irreparably damage Bishop Estate

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[27] (continued)

> higher price becomes obvious when one considers the possible sale of at least 60,000,000 square feet of land the Estate owns. Assuming arguendo the Estate could realize $1.00 a square foot more, the Estate could realize an additional $60,000,000. It was with this forethought that the Trustees decided to challenge the Land Reform Act. Such action does not, from the view point of the Estate seem to be unreasonable and the payment of legal fees in the amounts mentioned above may be of benefit to the Estate.

(emphasis added)

[28] See n. 27, supra.

and its beneficiaries, not to mention the State as a whole.[27]

B. Amici's Argument Is Not Relevant to the Questions Presented in These Appeals.

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[27]These are not idle fears. In 1976 and 1977, for example, dissatisfied tenants in Waiahole-Waikane on Oahu who did not qualify for fee purchase under the Act for various reasons, including the fact that their leases had actually expired, staged a rent strike against the single landowner, blocked highways, burned eviction notices, and refused to leave. See Tenants Won't Budge -- Next Move Is Up To . . .?, Honolulu Advertiser, January 4, 1977, at A1, col. 2, and The "War" of Waiahole, id. at A3, col. 2. The threat of violence was averted only when the State, exercising its general eminent domain powers, condemned the area: "The Hawaii Housing Authority yesterday paid $6 million in exchange for the deed to 600 acres in Waiahole Valley. Payment of the state housing fund to Elizabeth Marks means that the state is now officially the owner of the Windward Oahu valley where a year ago tenants were carrying on a bitter eviction fight. Earlier this year. Gov. George Ariyoshi announced that the state would buy the land. The decision averted possible confrontation between the tenants and the police over evictions." State Now Owns Waiahole Valley, Honolulu Advertiser, December 1, 1977, at A13, col. 1.

Built as it is upon this house of cards, Amici's argument that the Hawaii Land Reform Act should be struck down because it could possibly impact negatively on Native Hawaiians is at best suspect. But even if Amici's premises were not disputed, the conclusion Amici urges has no relevance to the issues before this Court.

This case is about two questions of law: (a) whether the power of eminent domain may be used in the fashion and under the circumstances set forth in the Hawaii Land Reform Act; and (b) whether the federal courts which are far removed from the problem and the solution should strike down the Act as facially unconstitutional when state judicial consideration is pending. Amici's attempt to expand those questions into a full-blown judicial debate on the existence and causes of the problems of Native Hawaiians should not be condoned.

CONCLUSION

The Hawaii Land Reform Act should be recognized for what it is: an excellent, workable compromise solution to a complex, multi-faceted problem which transgressed no constitutional boundaries and which, in its degree of public involvement and continued evolution, represented and continues to represent the best in our democratic tradition. The majority decision of the United States Court of Appeals for the Ninth Circuit should be reversed and the Act validated on its face.

Respectfully submitted,

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No. 83-141

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE HOU HAWAIIANS AND MAUI LOA, CHIEF OF THE HOU HAWAIIANS

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HAWAII HOUSING AUTHORITY, et al.,

Appellants,

v.

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Appellees.

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HOU HAWAIIANS AND MAUI LOA, CHIEF OF THE HOU HAWAIIANS

The Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, submit this brief as *amici curiae*. The Hou ("new" or "reborn" in the Hawaiian language) Hawaiians is a Hawaii-based, nonprofit Native Hawaiian ohana ("tribal body") which advocates and represents the interests of the approximately 8,000 Native Hawaiian applicants for Hawaiian homestead lands before courts, legislatures and administrative agencies,

and which educates the public on Native Hawaiian land rights. The Hou Hawaiians was founded in 1975 and has approximately 300 members. Maui Loa, a Native Hawaiian of at least 50% Hawaiian blood, is the Chief of the Hou Hawaiians. Born Doctor Nui Loa Price and now generally known under the name Maui Loa, he is a well known Hawaiian ethnic artist and craftsman. As Chief of the Hou Hawaiians, Maui Loa devotes much of his time to advocating justice for the Native Hawaiian people. He is a duly registered applicant with the Hawaii State Department of Hawaiian Home Lands for a Hawaiian homestead lot, for which he applied in 1974 pursuant to the Hawaiian Homes Commission Act.

The purpose of this brief is to bring to the Court's attention the situation of the Native Hawaiian people, deprived of their ancestral homelands and landless today, as it may affect the issues presented by the parties. *Amici* take no position respecting affirmance or reversal of the decision below, having confidence that this submission will assist the Court in arriv-

ing at a just result.[1]

INTEREST OF AMICI

Amici file this brief as spokesmen for their brothers and sisters, the Native Hawaiian people who live today in their ancient homeland. This case involves one aspect of the issue which for the Native Hawaiian has importance that overwhelms all others -- the restoration to him of his ancient lands, and his resettlement on them.

Native Hawaiians are today "a landless people in the country of their forefathers." S. Doc. No. 151, *Report of the Joint Committee on Hawaii*, 75th Cong., 3d Sess. 83 (1938). Largely deprived of their ancestral homelands and in the great majority reduced to poverty, as the United States Commission on Civil Rights records, Native Hawaiians are bitter about "the historic loss of their homelands" and wish "to return to their self-sufficiency associated with living off the land and sea." Hawaii

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[1] Appellant and appellees have consented to the filing of this brief amicus curiae. Letters of consent are filed with the Clerk.

Advisory Committee to the U.S. Commission on Civil Rights, *Breach of Trust? Native Hawaiian Homelands* at 7 (October 1980) (hereafter *Breach of Trust*).

The land of Hawaii is closely held or controlled today by a small group of landowners,[2] descendants of those who have invaded the islands from abroad during the last 200 years. By one means or another -- fraud, cajolery, force or purchase at absurd prices -- they have reduced to their own private ownership land that, in ancient Hawaii, the Chiefs and then the King held and administered for the benefit of the whole Hawaiian people.

The statute challenged here, Hawaii's Land Reform Act, recognizes the principle and establishes the possibility that a portion of such holdings may be restored to those for whom *amici* speak, the Native Hawaiians. In supporting the principle *amici* do not say that appellees, or any other particular landholder, should be

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2 See pp. 31-33 infra.

the statute's target. What is important to *amici* is recognition of the principle that a law which permits the taking of such large holdings, and their redistribution to the landless, is in conformity with the Constitution.

ARGUMENT

1.

The Hawaiian Islands were "discovered," as far as the Western world is concerned, by Captain James Cook in 1778. At that time there existed on the islands a settled Polynesian population, which had emigrated from the eastern Pacific over millenia. These people had developed a mature culture, a prosperous economy and a complex, anthropomorphic religion.

The basis of Hawaiian civilization was a land tenure system, called by Westerners feudal.[3] The basic land unit,

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[3] See, for the following description, 1 R. Kuykendall, The Hawaiian Kingdom at

the ahupua'a, was usually a wedge shaped tract of up to 100,000 acres in extent. Its boundaries followed natural features from the summit of a mountain down to the sea. It included inland agricultural and forest lands and coastal fishing lands with access to Hawaii's rich ocean fishing waters; so that normally the ahupua'a was economically self-contained, its entire population gaining its living from the unit. The ahupua'a was in turn divided into smaller sections called 'ili and was further subdivided into individual parcels farmed by the population.

There was no ownership or title to land, as such. All the land of a kingdom was considered to belong to, to be within the gift of, the King or Great Chief of the Kingdom, the alli-'ai moku (literally, "the chief who protects the land that gives the food"). He in turn assigned the ahupua'a to subchiefs, or alii-'aiahupua'a.

9-10 (1968 ed.) (hereafter Hawaiian Kingdom); N. Levy, Native Hawaiian Land Rights, 63 CAL. L. REV. 848, 848-49 (1975) (hereafter Levy); F. Cohen, Handbook on Federal Indian Law at 797-99 (1982) (hereafter Cohen); Breach of Trust at 3.

They would reassign smaller sections to lower ranking chiefs, the konohiki, who administered the land and governed the farmers and other tenants who made up the general population, the maka'ainana ("people of the land"). In sum, government and landholding were inextricably woven together in a single social fabric.

The great Hawaiian King, Kamehameha I, with Western assistance, first united the Hawaiian Islands into a single nation between 1794 and 1810. Kamehameha thereupon became the alli-'ai moku of the entire Hawaiian Island kingdom, with sole authority, as "owner" and as government, over all of the lands of the kingdom. All other chiefs, subchiefs and tenants in turn held at his pleasure; there was no right of inheritance. In short, there was no such concept as fee simple ownership. *Hawaiian Kingdom* at 46-51, 52-53, 73; *Cohen* at 798; *see Levy* at 849. Non-Hawaiians were altogether excluded from landholding. As one traveller found in 1818, "Europeans are not allowed to own land. They receive it on condition that after death it shall

be returned to the King, and during their life time it is not transferable from one to another." *Hawaiian Kingdom* at 60.

After Kamehameha's death in 1819, the native system of land holding began to change under the pressure of Western influence.

> Results of Western contact with Native Hawaiians parallel results of European contact with mainland Indians. Native population fell drastically as traditional systems collapsed. Westerners turned the Islands' traditional, self-sufficient economy into one geared to international trade. A small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence.

Cohen at 799 (footnote omitted).

English, Russian, French and American settlers began arriving in the islands early in the 19th century. A settlement of American missionaries from New England arrived in 1820 and rapidly Christianized the Islands' population. By 1825, under the guns of an English warship, the Chiefs persuaded the regent for young King Kamehameha III to permit inherited suc-

cession of the land of greater chiefs. *Hawaiian Kingdom* at 119-20. By 1832, the King's power to redistribute land was further curtailed; it was provided that a chief could not be deprived of his land-holding except in a case of violation of law.

Westerners who received "grants" of land from chiefs under the traditional system were dissatisfied with what they considered to be the insecurity of their land titles. They began to demand freedom from the possibility of what they viewed as arbitrary dispossession of their land-holdings. They sought the right freely to sell or transfer their holdings. In 1836, the captains of a U.S. and a British warship urged the Hawaiian government to allow foreigners freely to purchase land in what amounted to fee simple ownership. The King feared that if he allowed private foreign ownership of land, he would not only lose his ancient rights to dispossess the holder and to redistribute the land, but also would lose his governmental authority over the land and its owner. *Hawaiian Kingdom* at 138, 145.

In 1835, an American firm, Ladd & Company, leased a thousand acres on the Island of Kauai, for fifty years at $300 a month, for the cultivation of sugar. That year marked the beginning of the immensely profitable sugar industry in Hawaii, the beginning of the end of the old land tenure system and the beginning of the process that resulted in almost entire Western domination of Hawaiian landholdings. What amounted to a revolution in landholding law in Hawaii began in 1840 and was virtually complete by 1850. *Hawaiian Kingdom* at 175-82.

Hawaii's first Constitution, proclaimed in 1840, reflected the traditional concepts of land ownership. Land, although "owned" by the King, "belonged to the Chiefs and people in common," under the King's management. The Hawaiian common people, while at the bottom of the feudal hierarchy, enjoyed the use of the national land, which carried with it fishing rights, water rights and wood gathering rights in the forests. *Hawaiian Kingdom* at 269-71; *see Liliuokalani v. United States*, 45 Ct.Cl. 418, 425 (1910); *see also*

United States v. Fullard-Leo, 331 U.S.256, 266-69 (1947).

Dramatic change had already begun. The Declaration of Rights of 1839, incorporated in the 1840 Constitution, provided that landed property could no longer be taken from any person, except as expressly provided by law and as long as the owner conformed to the laws of the Kingdom. An 1839 statute formally permitted inheritance of small parcels of land and provided that large holdings could be inherited provided that one third was returned to the King. *Hawaiian Kingdom* at 161. In 1840, twenty-five year leases to foreigners were permitted; in 1841, the term was increased to fifty years. But these changes did not satisfy foreigners' thirst for fee simple ownership, a restriction on them reaffirmed by law in 1843. *Id.* at 161, 239, 271, 275; H. Bradley, *The American Frontier in Hawaii* at 239 (1968) (hereafter *Bradley*).[4]

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[4] It is worth noting that one of the leaders of the 1820 missionaries, Hiram Bingham, strongly opposed liberalizing land ownership in favor of foreigners. He felt

At first the Hawaiian government insisted on its view that the Hawaiian land could not be sold, its title permanently transferred, nor even leased at long term without the government's consent. The first breach came in 1846. A statute enacted in that year permitted sales of land in fee simple to Hawaiian citizens, the restriction on such sales to foreigners remaining in force. *Hawaiian Kingdom* at 276, 279; *Levy* at 857.

Foreign pressure to obtain ownership of land did not abate. In 1846 a commission was named to review the entire land tenure question and to make recommendations for a comprehensive resolution of the issue. The importance of Western influence is reflected in the commission's

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it "would prove disastrous to the native population." Bradley at 279. The missionaries sought to "preserve[] Hawaii for the Hawaiian people." They saw the "crux of the problem" as "ultimate control of the resources of the Islands, and especially of the soil," and they feared that "the real control of Hawaiian agriculture -- and hence of the economic life of the nation -- would pass into the hands of aliens." Id. at 365-66. In fact this is exactly what happened. See pp. 17-22 infra.

composition: two Hawaiians, two Westerners, and one half-Hawaiian. *Hawaiian Kingdom* at 280; *Levy* at 853.

The result of the commission's work was what has come to be known as "the Great Mahele" of 1848. The principle of the Mahele ("division" in Hawaiian) was that the lands of the kingdom, until then held in feudal title by the King in trust for the chiefs and common people, would be divided in three parts: one part to the King as private landlord, the "crown lands"; one part to the government as such, and one part to the chiefs as individual fee simple title holders. On completion of the Mahele in March 1848, the government held 1.5 million acres, the King held 1 million acres of crown lands and the chiefs as private landlords held 1.5 million acres.

No specific provision was made in the Mahele for distribution of land to the common people as tenants (hoaaina). It was stated as a principle that "the rights of the hoaaina must be respected," *Hawaiian Kingdom* at 284-89; *Levy* at 855, and it was generally understood that the

Mahele was intended to distribute one third of the Kingdom's land to the common people. It is plain, however, that "the common people never received the third of the lands presumably reserved for them." S. Doc. No. 151 at 82.

Legislation in 1850 was designed to give the hoaaina the opportunity to purchase their kuleana, the property they had occupied as feudal tenants on government land, crown land or the chiefs' land. *Levy* at 855; *Hawaiian Kingdom* at 291-94. The kuleana grant turned out to be illusory. First of all, it covered only lands "which a tenant had 'really cultivated,'" *Levy* at 855. This eliminated lands of the old ahupua'a that had been cultivated in common by a number of people, used for pasturage or simply used as a resource for forest products such as wood for building houses and canoes, firewood and the like. Second, the hoaaina had to prove his claim before the Land Commission and had to pay survey costs. Many Native Hawaiians were without the sophistication to "prove" a land claim, and most were too impoverished even to pay the less than $20

in survey costs. *See Levy* at 856.[5]

The kuleana legislation largely failed in providing land ownership to the native people of Hawaii. By the time the distribution process had ended, fewer than 30,000 acres -- less than one percent of the land area of the Island kingdom -- had been distributed to fewer than 9,000 individual Native Hawaiians. *Hawaiian Kingdom* at 293-94; *Levy* at 856. Later legislation, enacted in 1851, which provided for sale of government land to

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5 What happened to the Native Hawaiian residents of Niihau is illustrative. After petitioning for kuleana grants, the residents were unable to pay the surveying costs and in 1865 the entire island, 61,000 acres, was sold to a single Western entrepreneur for $10,000. Levy at 859; Breach of Trust at 4. The descendants of the 1865 purchaser, the Robinson family, own Niihau today. They appear to hold it as absentee lords of a feudal fiefdom, devoted mainly to livestock raising. It is reported that outsiders have great difficulty in obtaining access to Niihau without the owners' permission, that its Native Hawaiian residents (the owners' employees and their families) are discouraged from leaving, and that indeed English is not taught in the island's schools.

Native Hawaiians who had not been hoaaina and therefore did not qualify for kuleana grants, was no more successful. The legislation provided for the sale of lots of less than 50 acres at no less than fifty cents per acre and, as before, most Native Hawaiians did not even have the minimal amount of cash necessary for such purchases. *See Levy* at 857.

Meanwhile, in 1847 legislation permitted non-Hawaiians to acquire fee simple title to land which they occupied by lease or informal grant, on payment of a commutation fee to the King. The only restriction was that the land could not be resold to another foreigner. In 1850 even this restriction was removed, under the vigorous pressure -- including scarcely veiled threats of foreign military intervention -- of the United States government's resident commissioner in Hawaii. *Hawaiian Kingdom* at 296-97; *Levy* at 857 n. 62, 859.

Thus, by 1850 there was in place the legal structure that permitted Western capital to acquire ownership of the great bulk of valuable and productive land in

the Hawaiian Islands. Sugar cultivation provided economic incentive. A sugar planting boom began in 1850. In 1855 Hawaii exported 290,000 pounds of sugar; in 1858, 1.8 million pounds. Sugar growing and the sugar trade were controlled entirely by Westerners, mainly Americans and Britishers. Native Hawaiians gained no benefit from the new industry. Not a single Native Hawaiian owned a sugar plantation, and Native Hawaiians were "considered unsatisfactory and insufficient in numbers for a plantation labor supply." S. Stevens, *American Expansion in Hawaii, 1842-1898* at 34-35, 143, 145 (1968 ed.) (hereafter *Stevens*).

The Hawaiian plantation economy and society resembled that of the pre-Civil War South of the United States, "with a small and powerful planter aristocracy" -- English and American -- "in full possession of economic and social privileges." Instead of cotton, sugar was king, and dominated the Hawaiian economy. *Stevens* at 143; *Levy* at 858.

The planters' appetite for land was voracious. By 1893, over 600,000 acres

of government land had been sold, at an average price of 92 cents per acre. Westerners bought most of it. For example, by 1864, 213 Western purchasers had acquired more than 320,000 acres. Large tracts also were leased for agricultural purposes. By 1890, 76 lessees held more than three quarters of a million acres of crown and government land which they leased "at an annual rate of pennies per acre." *Levy* at 859.

Native Hawaiians did not long hold their kuleana. Owners of large ranches diverted water from the small holdings; their livestock trampled kuleana crops. At the same time kuleana holders had lost their ancient rights to pasture animals, raise crops and gather in the forests of the large holdings. Natural boundaries were obliterated. By a process of abandonment, adverse possession and purchase at nominal prices, most of the kuleana passed out of the possession of Native Hawaiians into Western hands. *Levy* at 861, 867-70; *Cohen* at 800.

Thus, in less than fifty years control of the Hawaiian economy and ownership

or control of the Hawaiian land, once the life's blood of its people, had passed out of Native Hawaiian hands and into the control of Westerners, chiefly Americans. By 1893 taxable land owned by Native Hawaiians amounted to a little over 250,000 acres. Much of this of course was in the hands of the remaining chiefly families and much, in turn, leased to Western interests. At the same time, over one million acres of taxable land were owned by non-Hawaiians. *Stevens* at 145.

With loss of their land came the virtual decimation of the Native Hawaiian people. From a population of 300,000 at the time of the first Western contact, by 1890 the Native Hawaiian people were reduced in numbers to 41,000. *Cohen* at 799; *Stevens* at 145. "By the last decade of the nineteenth century, Native Hawaiians had been excluded from the mainstream of the economy; they had lost ownership of most privately held land and had been reduced to a minority of the inhabitants of the kingdom." *Cohen* at 800 (footnotes omitted).

In 1893 the American settlers, sup-

ported by U.S. Marines from the U.S. cruiser *Boston*, rebelled against and overthrew Hawaii's last monarch, Queen Liliuokalani. Their plain purpose, to join Hawaii to the United States by annexation, was condemned by President Cleveland. In an 1893 message to Congress the President excoriated the U.S. Minister to Hawaii for improperly promoting annexation, condemned the landing of the U.S. Marines as obtained on false pretexts and "lawless," declared that in such circumstances U.S. acquisition of Hawaii would be unjustifiable and withdrew a proposed treaty of annexation from the Senate.[6] Five years later, in the wave of imperialism in McKinley's administration that saw the United States acquire an empire elsewhere in the Pacific and in the Caribbean,[7] Hawaii was annexed by the United

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6 President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. XIII (1893).

7 The Philippine Islands, Guam, Cuba and Puerto Rico. See B. Tuchman, The Proud Tower at 145-67 (1966).

States.[8]

The rebel Republic had assumed control of the government lands in 1893 and had taken title to the crown lands in 1894. Its constitution expressly abrogated the trust for the people impressed upon the crown lands. *Liliuokalani v. United States*, 45 Ct.Cl. at 428. The crown and government lands passed to the United States with annexation. *Id.* at 436; *Levy* at 863; *Cohen* at 801.[9]

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8 See Cohen at 800; Levy at 861-65; E. Carpenter, America in Hawaii at 177-91, 233-248 (1899); L. Young, The Real Hawaii at 177 et seq., 297-303 (1899); Liliuokalani, Hawaii's Story by Hawaii's Queen (1964 ed.); Stevens, supra at 187-299; 3 R. Kuykendall, The Hawaiian Kingdom at 523-650 (1967).

9 Congressional expression of the annexation era is imbued with the jingoism typical of the period. For example, Congress' first look at the picture of land distribution in Hawaii reflected concern that any change in the situation might inhibit "the immigration of Anglo-Saxon settlers, who are now needed in order to maintain American institutions" and suggested that any change "may be perilous to American interests." H.R. Rep. 305, Government for the Territory of Hawaii, 56th Cong., 1st Sess. 15 (1900).

2.

The only effort the United States government has made to remedy the injustice done to the Hawaiian people in the name of American interests by American settlers and by the United States government, was the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 *et seq.* (1921), formerly codified at 48 U.S.C. §§ 691-716. The Act set aside about 200,000 acres of land in the territory of Hawaii to be distributed as homesteads to Native Hawaiians, defined as persons of at least one half Native Hawaiian blood. *See* S. Doc. No. 151 at 84; *Levy* at 876; 48 U.S.C. former §§ 697, 698. The Act appears to have been engendered by the territorial legislature of Hawaii, and sponsored in the U.S. House of Representatives by Hawaii's nonvoting Delegate, Prince Jonah Kuhio Kalanianaole, who served as Delegate from 1903 to 1921; it has been called "a monument to [Prince Kalanianaole's] love for his people." S. Doc. No. 151 at 84. Its purpose, at least in the minds of the territorial legislature as presented to the Congress, was twofold: to recognize

that Hawaii's crown lands were impressed with a trust relationship, indeed "belong-[ed] to the common people" of Hawaii, *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings before the House Committee on Territories*, 66th Cong., 2nd Sess. 32 (February 3, 4, 5, 7 and 10, 1920), and to provide an economic base for the improvement of the economic and social situation of the Native Hawaiian people. *See id.* at 26, 38. Even the Secretary of Interior of the time, Franklin K. Lane, viewed the setting aside of land for the Native Hawaiian people not as an act of grace by the Congress, but as an act that "should be done as a matter of justice -- belated justice." *Id.* at 123.

The Congress was animated by a purpose to restore some of Hawaii's land to the Native Hawaiian people "because," as the Committee chairman declared, "the Hawaiians were deprived of their lands without any say on their part, either under the Kingdom, under the republic or under the United States government." *Id.* at 170. The Committee report reiterated that the Native Hawaiian population "assumed that

the ... [land] ... was being held in trust by the crown for their benefit," and recognized that the land indeed never had been transferred and that the rebel Republic of Hawaii had "arbitrarily seized" the lands. H.R. Rep. No. 839, 66th Cong., 2nd Sess. 5 (1920). In the floor debates, Del. Kalanianaole argued for the legal and moral rights of the Native Hawaiian people to have land set aside for their benefit, 59 CONG. REC. 7453 (1920). There is no indication in the debates that his arguments were not sympathetically received. *Id.* at 7447-457, 7495-504.

The bill that finally became the Hawaiian Homes Commission Act was introduced in the next Congress. In a second set of hearings, the chairman of the Committee on Territories noted that the motivating factor behind the legislation was similar to that behind similar legislation relating to Indian tribes: "because we came to this country and took their land away from them .... why can we not do the same thing for the Hawaiians whose land was taken away from them ...." *Proposed Amendments to the Organic Act of the Ter-*

ritory of Hawaii, Hearings on H.R. 7257 before the House Committee on Territories, 67th Cong., 1st Sess. 141 (June 9 and 10, 1921).

When Hawaii was admitted to the Union, congressional action reaffirmed the principle of restitution that motivated the setting aside of lands for Native Hawaiians. Section 4 of the Hawaii Admission Act, P.L. 86-3, 73 Stat. 4, 48 Prec. U.S.C. § 491 *et seq.* (1959), made the Hawaiian Homes Commission Act and its land set-aside provision part of a compact between Hawaii and the United States, included in the Constitution of Hawaii. In the Senate debates on Hawaii's admission Senator Jackson, sponsor of the bill, explained section 4 as dealing

> with a problem arising out of the original acquisition by the United States of the Hawaiian Islands. As a condition, our Government promised to retain certain lands for the benefit of the Native born Hawaiians. The Hawaiian Homes Commission Act of 1920 expresses the intent of Congress to adhere to that promise.

105 CONG. REC. 3845 (1959). In the House,

Chairman Aspinall of the Committee on Interior and Insular Affairs stated that the purpose of the homestead set-aside provision "was, of course, to give to the Hawaiian people 50% or more Hawaiian blood *the right to ownership and use of some of the land that was taken away from them* when the treaty was originally made." 105 CONG. REC. 4005 (1959) (emphasis added).

3.

But the promise of the Hawaiian Homes Commission Act has never been fulfilled. As of 1938, the Congress noted, "[o]nly a small part of this area has of yet been used, the remainder being held in trust for future projects, and leased temporarily in the meantime." S. Doc. 151 at 84. As late as 1975, only 15% of the Hawaiian homestead lands were in the possession of Native Hawaiians. Only 69 families lived on ranch-sized parcels, 365 families lived on farms and 2,000 families had been assigned urban or rural houselots. As the authoritative commentator on Native Hawaiian land rights wrote: "the Hawaiian Homes program must be considered a failure as measured by its

original objective to rehabilitate Native Hawaiians by returning them to a farming life .... Today the greatest demand for homesteads is for urban houselots, and accounts of 20-year waits for houselots on land-short Oahu have been documented." *Levy* at 877 (footnotes omitted). As he concluded, the reason for the failure has been the desire of the State of Hawaii (administrator of the homestead program since statehood) to maximize revenue from the land by leasing it, for example to agricultural interests in large parcels, in preference to its distribution to those who are the intended beneficiaries. *Id.* at 877-79.

Matters have moved little since. The situation today is reflected in the findings of an intergovernment task force issued in August of this year. Federal-State Task Force on the Hawaiian Homes Commission Act, *Report to the United States Secretary of the Interior and the Governor of the State of Hawaii* (August 15, 1983) (hereafter *Task Force Report*).[10]

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[10] The appointment of the task force, in

The task force affirmed that "the goal" of the Homestead program "was and still is to enable native Hawaiians to return to their lands in order to provide for their self-sufficiency, initiative, and preservation of native Hawaiian culture." *Task Force Report* at 14. It found, however, that this goal was still a dream:

> as of May 31, 1983, 7,901 applicants continue to wait for homestead awards. In addition the State has not identified with precision the Hawaiian Home lands that constitute the assets of the trust; it has not at all times accounted accurately for revenues associated with trust lands; it has not maintained auditable financial records

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July 1982, was the result of a lawsuit filed by amici curiae and other Native Hawaiians. The lawsuit, against the Attorney General and the United States, sought to compel the United States, as Trustee of the crown and government lands received with annexation, to compel the State of Hawaii to fulfill its duty to distribute the lands as homesteads to the Native Hawaiian people. Task Force Report at 7. The lawsuit is in abeyance pending action by the federal and state governments to carry out the task force's recommendations.

> and statements; and, it has entered into conveyances and encumbrances of Hawaiian Home lands that have not been authorized by law.

Task Force Report at 22. Of the nearly 8,000 pending applications, over 4,000 were for residential houselot homesteads on the island of Oahu, location of Hawaii's principal city and capital, Honolulu. Beneficiaries sometimes must wait as long as 30 years to receive homesteads. *Task Force Report* at 26. Many have died while on the waiting list.

More than 30,000 acres of Hawaiian homestead land have been removed from the set-aside program in violation of the terms of the Hawaiian Homes trust. Some land is leased at ridiculously low rentals. For example, some land is leased to the United States Department of Defense at $1 an acre; 16,000 acres are under lease from the Hawaiian Department of Land and Natural Resources at only $5 per acre per year.[11]

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[11] Task Force Report at 39, 41, 45, 51. A 1982 report by the Inspector General of the United States Department of Interior docu-

The task force recommended that the award of homesteads to Native Hawaiians be accelerated and that during the next five years the State and the United States

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ments the federal and state governments' neglect of their stewardship of their trust of Native Hawaiian home lands. Audit Report, "Review of Hawaiian Homes Commission Act Programs Operated by Department of Hawaiian Home Lands, State of Hawaii," September 8, 1982, reproduced in Native Hawaiian Study Commission, Report on the Culture, Needs and Concerns of Native Hawaiians Pursuant to Pub. L. 96-565, Title III at 372 et seq. (1983). About 17,000 acres of the total acreage originally set aside and later acquired for the program inexplicably have been lost. Some of this appears to be valuable sugar cane land. Over 13,000 acres were illegally "withdrawn" by the State under "Governor's Executive Orders." The State has kept revenues from these "withdrawn" lands, instead of applying them to trust uses. As of 1981, only 26,062 acres of land had been distributed to 3,034 homesteaders with an additional 13,706 acres used as community pasture. As noted above, nearly 8,000 applicants wait. The farm homestead program is in serious trouble. The Inspector General estimated that completion of the program would require $600 million. Report at 380-92. The State's cash management is faulty; interest that should be earned is lost. No financial statements are prepared; the accounts cannot be audited. Id. at 393.

should each appropriate 25 million dollars per year to enable the program to be carried out. *Task Force Report* at 29, 32.

The task force pointed out that both the State and the federal government have continuing trust responsibilities to the Native Hawaiian people. These include a possible action by the United States against the State for breach of trust. *Task Force Report* at 19-22. On September 27, 1983, the Secretary of Interior declared his acceptance of the Task Force Report and its recommendations -- including the United States' obligation to bring suit as a last resort if the task force's recommendations are not carried out.[12]

4.

The ownership of land in Hawaii today is as concentrated as it was in the days of the Kingdom. There are eight major islands in the Hawaiian chain, which make up the more than four million acres of land

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12 Letter from Secretary of Interior James Watt to Hon. George R. Ariyoshi, September 7, 1983, with attached Response of the Secretary of the Interior to the Recommendations of the Federal-State Task Force on the Hawaiian Homes Commission Act.

in the state. The island of Kahoolawe, 28,800 acres, is almost entirely owned by the federal government. The island of Niihau, 46,000 acres,[13] is almost entirely owned by a single company owned by a single family. Most of the land is used for grazing. The island of Lanai, 90,000 acres, is almost entirely owned by a major corporation, Castle & Cooke, Inc., a company founded by early American settlers more than a century ago. Most of Lanai is used for grazing and the growing of pineapples.

Overall, the state government owns a little under 39% of the total land area in the state, the federal government owns a little less than 10%, and only 72 private landowners, owning tracts of 1,000 acres or more, own 47%. This leaves less than 5% of the land in Hawaii available for a population of approximately one million.

Nor do these figures tell the whole story. The 18 largest landholders, with tracts of 21,000 acres or more, own more

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13 The discrepancy between this figure and that given at p. 15 n. 5 supra is in the sources.

than 40% of the state's land area.[14] On Oahu, the most urbanized of the islands, as of 1975 only 22 landowners owned 72.5% of all land on the island. Jurisdictional Statement at 1. The Bishop Estate, whose trustees, appellees here, seek a declaratory judgment that the Land Reform Act at issue in this case is unconstitutional, owns 9% of all of the land of the state. Five corporations[15] together own more than 13%; a single ranch, the Parker ranch on the "Big Island" of Hawaii, owns close to 5%.[16] One "estate" owns 3.5%, another a shade under 2%.

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14 The figures (except for Oahu) in this and the preceding paragraph are 1967 statistics. State of Hawaii, Legislative Reference Bureau, Report No. 3, 1967, Public Land Policy in Hawaii: Major Landowners (1969 reprint).

15 Castle & Cooke, Inc., C. Brewer & Co., Ltd., Alexander & Baldwin, Inc., Amfac, Inc. and Theo H. Davies & Co., Ltd. (the legendary "big five").

16 The Parker ranch's history is illustrative of how Westerners acquired, and kept, Hawaii's land:

5.

The hardship, the inflated prices for residential housing and the inability to purchase homes which (appellant argues) motivated the State of Hawaii in enacting the legislation at issue here, Jurisdictional Statement at 2-4, burdens the Native Hawaiians more heavily than any other residents of the state. The disadvantaged economic situation in which they find themselves makes it especially difficult for Native Hawaiians to acquire a decent

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By 1815 thousands of wild cattle roamed the hills of northern Hawaii, trampling crops and terrorizing farmers. Finally, Kamehameha [I] permitted a young Massachusetts sailor, John Palmer Parker, to shoot the cattle and supply salted beef to foreign vessels and local people. Parker married into a prominent Hawaiian family and established what is now one of the largest privately owned cattle ranches in the U.S.

The sprawling 224,000-acre Parker Ranch at the base of Mauna Kea and its 45,000 head of cattle are now owned by Richard Palmer Kaleioku Smart, sixth generation of the family. The ranch is so big its climate varies from desert to tropical rain forest.

L. Levathes, Kamehameha, Hawaii's Warrior King, 164 National Geographic 558, 589 (November 1983).

home -- as is evidenced by the thousands of applicants for houselot homesteads, who wait, seemingly forever, for the State to provide a homestead out of lands set aside more than 60 years ago by the United States government solely for the benefit of Native Hawaiians (*see* p. 29 *supra*).

Native Hawaiians recognize that it is unlikely that the administration of the Land Reform Act will directly benefit many of them. If, as seems likely, the State sells the land condemned under the statute at Hawaii's presently inflated land prices, few Native Hawaiians will be in a position to purchase. Nevertheless, the Native Hawaiians hope that the condemnation and distribution of properties under the Act will relieve the pressure on land prices from more affluent non-Native Hawaiians who bid prices up because of the shortage of residential land for sale.[17]

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[17] Appellees are trustees of the Bishop Estate, established by the Will of Princess Bernice Pauahi Bishop, a descendant of King Kamehameha I. It is a charitable trust whose intended beneficiaries are the Native Hawaiian people. The Estate's net income supports the Kamehameha Schools,

Moreover, Native Hawaiians believe that this Court's recognition of the desirability of distribution of land held in the iron grip of large holders, and of the principle that the social utility of such distribution confirms the constitutionality of legislation providing for it, will provide impetus to more rapid distribution to Native Hawaiians of homesteads under the Hawaiian Homes Commission Act.

CONCLUSION

The Native Hawaiian people were deprived of nationhood in the flush of

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whose policy is to accept children of Hawaiian blood as students; but its residential properties are leased almost entirely to non-Hawaiians. To the extent that lessees presently make the Estate's Native Hawaiian beneficiaries scapegoats for their inability to purchase and for extraordinarily high housing costs, the Land Reform Act's requirement that residential property be sold to lessees may lessen resentment against the Estate, its trustees (whose compensation from the Estate exceeds $200,000 each) and its Native Hawaiian beneficiaries. Sale proceeds also may provide greatly increased resources for the Estate to apply to the benefit of Native Hawaiians in a variety of ways.

American expansion. They have been severed from the land that nourished them and their culture, an injustice that the Congress, in the Hawaiian Homes Commission Act, and the recent Federal-State Task Force, have sought to correct at least in part. *Amici* urge this Court to consider the century or more of injustice that they have suffered, and their right to restoration to their ancestral land -- which is based on the principle that land may be redistributed to serve the needs of the people.[18]

The Native Hawaiian people are not only acutely aware of their own plight, but they are also sensitive to the legitimate needs of others for land. The

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18 As amicus Maui Loa has stated, in the course of his advocacy of the rights of his people: "The judicial power of the United States should be exercised to right the wrongs of the past that inadvertently or otherwise were committed by the United States of America in her eagerness to Westernize the Hawaiian Islands. The right to private property, accompanied by radical change in cultural values and lifestyle, has had the effect of leaving many Native Hawaiians impoverished and homeless in their own homeland."

Hawaii Land Reform Act is intended to promote the general welfare and meet the needs of today's multi-culture society in Hawaii. This Act, together with full, accelerated implementation of the Hawaiian Homes Commission Act, for which *amici* continue to strive, holds a promise of fulfillment, at last, of the stated intent of the Great Mahele -- to place the native people of Hawaii in full possession of their land.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

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Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE OFFICE OF HAWAIIAN AFFAIRS IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-141

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-236

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-283

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE OFFICE OF HAWAIIAN AFFAIRS IN SUPPORT OF APPELLEES

INTEREST OF AMICUS [1]

Your amicus is the Office of Hawaiian Affairs ("OHA"), established by the Constitution of the State of Hawaii.[2] The Office is a public body corporate, within, but independent of, the executive branch. The Office is funded by a share of the State's revenues from public lands.[3] It is a fourth branch of the government, unique to the State of Hawaii.

The Office of Hawaiian Affairs has the constitutional and statutory responsibility (among others): to enhance the "betterment of conditions" of Native Hawaiians and Hawaiians;[4] to serve as the principal state agency responsible for the "performance, development and coordination" of all programs and activities relating to Native Hawaiians and Hawaiians (except the Hawaiian Homes Program); to assess the policies, procedures and practices of the other agencies which impact on Native Hawaiians and Hawaiians; and to apply for and administer "grants and donations from all sources" to be used for programs benefiting Native Hawaiians and Hawaiians.[5]

The Appellees, being the trustees under the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first

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[1] Appellants and Appellees have consented to the filing of this amicus curiae brief. The letters of consent have been filed with the Clerk of the Court.

[2] HAW. CONST. art. XII, § 5 (1978). The Office of Hawaiian Affairs was established by an amendment to the Hawaii Constitution proposed by a regular Constitutional Convention convened in 1978 and ratified by the vote of the citizens of the State of Hawaii later that same year.

[3] HAW. REV. STAT. § 10-13.5 (Supp. 1982).

[4] In this brief, the term "Native Hawaiian" means a descendant of not less than one-half part of the blood of the (Polynesian) race which originally inhabited the Hawaiian Islands (i.e. prior to 1778). A "Hawaiian" means *any* descendant of that race.

[5] HAW. REV. STAT. § 10-3 (Supp. 1982).

Monarch of all the Hawaiian Islands, administer the perpetual charitable trust established by her Will. The trust was established by this Native Hawaiian, a beloved princess of the Hawaiian People, as the sole support of The Kamehameha Schools, which today provide a wide range of educational programs and services to Native Hawaiians and Hawaiians, both young and old. Because the programs and services offered by the Schools are of such scope and penetration, they readily enhance the betterment of conditions of Native Hawiians and Hawaiians through the process of education and training.

Because the statute challenged herein, as applied to the lands held in trust by the Appellees for these worthy purposes, may seriously affect the common beneficiaries of OHA and the Schools, your amicus feels constrained to speak out concerning pertinent facts and issues so as to help this Honorable Court make a wise and fully-informed decision herein.

STATEMENT OF THE CASE

While it accepts the Statement of the Case presented by the Appellees, your amicus earnestly feels that the following supplemental facts require the Court's review in its deliberations on the issues presented on appeal by the parties herein.

I. THE HAWAIIANS' LOSS OF THEIR LAND, THEIR SOVEREIGNTY AND THEIR CULTURE

Before its contact with Western Civilization, Hawaii persisted for nearly a thousand years as an outpost of a complex Polynesian Civilization. During this period, the Hawaiians had developed a highly complex culture founded on a stable land tenure system, a thriving co-operative and subsistence economy, a sophisticated societal hierarchy and religious practices which controlled every facet of the daily life of all.

Under the land tenure system, the main islands were divided into several separate kingdoms, with a high chief or king (*ali'i nui* or *mo'i*) controlling an island or part of an island. Each ali'i nui first reserved lands for his own use and then distributed the remaining lands to his most loyal chiefs. The chiefs would retain lands for *their* own use and pass on the rest to *their* followers.[6]

While other land division existed, the *ahupua'a* was the land unit most closely related to the every day life of the people. Ahupua'a varied widely in size, but usually were economically self-sufficient units whose boundaries ran from the mountain tops down ridges to the sea.[7] By design, the ahupua'a afforded to the chief and his people "a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top." [8]

A lesser chief (*ali'i ahupua'a*) or sometimes a land agent (*konohiki*) administered the ahupua'a. Most ahupua'a were further divided into smaller units; sometimes administered separately.

A highly-structured society operated within this land division pattern. At the top were the ali'i nui and priests (*kahuna*), then came the ahupua'a chiefs, the konohiki and, finally the commoners, the *maka'ainana*. The maka'ainana worked together under the direction of chiefs and priests in tilling common areas within the ahupua'a to support the chiefs and the priests. The maka'ainana, however, also had certain gathering rights within the bounda-

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[6] J. CHINEN, THE GREAT MAHELE 5 (1958).

[7] *In re Boundaries of Pulehunui*, 4 HAW. 239, 241-42 (1879); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 849 (1975).

[8] *In re Boundaries of Pulehunui*, 4 Haw. at 241.

ries of the ahupua'a and small parcels of land for their own use.[9]

Private ownership of land in the western sense had no place in the pre-contact Hawaiian culture. Although the chief was said to control the *use* of certain lands he did not own them. Rather, he held them *in trust* for all of the people. The chief's tenancy was *at will* and, when conquest or death brought someone new into the picture, lands would be redistributed according to the preference of the new chief.

The maka'ainana were not serfs. If the konohiki should mistreat them, they could simply pick up and move to another district. If this happened too often in an ahupua'a, the chief might question the konohiki's administrative abilities and replace him.

> This ancient land system was thus sharply different from Western ideas of private land ownership. The alii nui (or moi) himself enjoyed no absolute ownership of all the land. The alii nui was a trustee of all the people within an island (*moku*) or some other larger district. The konohiki also maintain a similar tentative position because the maka'ainana were free to leave the ahupuaa if they were unhappy with a particular chieftain (alii) or konohiki. In short, the members throughout the political hierarchy shared a mutual dependence in sustaining their subsistence way of life.[10]

To say that, traditionally, the ancient Hawaiians had a strong tie to the land would be an *understatement*. Surely the soil was there to till, the forests and mountain streams and lowland springs held their abundance, and

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[9] M. Kelly, Changes in Land Tenure in Hawaii, 1778-1850, at 25-26 (June 1956) (unpublished thesis in University of Hawaii Library).

[10] HAWAII INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT, HAWAII DEPARTMENT OF BUDGET AND FINANCE, LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979).

the bounty of the shore and its abutting off-shore waters was there waiting to be gathered. However, there was more . . . much more! The Hawaiian even today looks to his native land as a major source of spiritual power to him.

Western contact and its attendant influences brought rapid changes. While the powerful Kamehameha the Great was alive, little was done to change the system.

His son, Kamehameha II, decided that he would not redistribute the lands upon his father's death in 1819.[11] Westeners applauded this action. Under Kamehameha II, many of these Westerners were given land by the King and the chiefs in return for their services. These grants were made with the understanding that the lands would eventually be returned as under the traditional system, but both the Westerners and some of the Hawaiians now began to feel that it was only reasonable to hope that the land might be retained.

Finally in 1825, when Kamehameha III took the throne at the age of 12, the Council of Chiefs convinced him to adopt a new policy allowing the chiefs to retain the land upon the death of a king and permitting succession by inheritance.[12]

A growing agricultural economy, begun by Westerners, applied new pressures for change in the land tenure system. By 1839, Kamehameha III had declared that property ownership, such as existed on a limited basis, was protected by due process of law.

In 1840, a constitution was adopted for the first time. The constitution, among other things, codified the King's status as a trustee when it came to the holding of the lands. Also in 1840, a statute was enacted providing that:

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[11] LEVY, *supra* note 7, at 850.

[12] 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, at 119-22 (1938).

"No man living on a farm whose name is recorded by his landlord, shall without cause desert the land of his landlord. Nor shall the landlord causelessly dispossess his tenant." [13]

In 1841, Kamehameha III announced a plan allowing his island governors to lease land to foreigners for terms up to fifty years.[14]

Unsatisfied, American and British interests keenly sought further changes in the land tenure system. In 1846, a "Board of Commissioners to Quiet Land Titles" was established to investigate and confirm or reject all claims of private individuals, whether natives or foreigners, to land acquired prior to the creation of the Commission.[15] Its decisions, subject only to appeal to the Hawaii Supreme Court, were to be based on existing land law of the kingdom, including "native usages in regard to landed tenures . . ." [16] The Commission had five members: two were Hawaiians, one was half-Hawaiian, and two were Americans.[17]

At first, the Commission dealt only with title to building lots in the major towns of Honolulu and Lahaina and claimants proving rights to these lands received Land Commission Awards. Even though the concept of fee simple ownership was not part of the Hawaiian system, the Minister of Interior issued patents in fee simple on these awards.[18]

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[13] Act of November 9, 1840, § 6, reprinted in THE FUNDAMENTAL LAW OF HAWAII 18-19 (Thurston ed. 1904).

[14] 1 KUYKENDALL, *supra* note 12, at 275-76.

[15] Act of April 27, 1846, Pt. I, ch. VII, art. IV reprinted in 2 REVISED LAWS OF HAWAII 1925, at 2120-24 [hereinafter cited as "RLH 1925"].

[16] *Id.*, § 7 reprinted in RLH 1925, at 2123.

[17] 1 KUYKENDALL, *supra* note 12, at 280.

[18] Act of April 27, 1846, *supra* note 15, § 10, reprinted in RLH 1925, at 2123.

In 1846, the Commission adopted a set of principles, which were subsequently ratified by the legislature.[19] The principles were prefaced by a statement that "there are but three classes of persons having vested rights in the land, 1st, the government [the King], 2nd, the landlord, and 3rd, the tenant . . ."[20] Most everyone agreed, but just how these principles would be effectuated was hotly debated. Finally, in December, 1847, the King and the Privy Council announced that the King would retain his private lands, "subject only to the rights of the tenants," and that the remaining land of the kingdom would be divided into thirds: one-third to the government, one-third to the chiefs and konohiki and the final third to the tenant maka'ainana.

The so-called *Mahele* (meaning "division") began in 1848. At stake were some four million acres of land.

First, the King quitclaimed his interest in specific lands under the control of 251 chiefs to them and the chiefs quitclaimed their interest in the balance of the lands to the King. Later, the King divided his lands into two parts. The larger portion he "set apart forever to the chiefs and people of my Kingdom." The smaller portion, approximately one million acres, he retained for himself, his heirs and successors.[21] These retained lands were known as "the King's Lands," while those he gave to the government were designated as "Government Land."

Under the Mahele, the chiefs could receive fee title to their lands by either paying a commutation tax of one-third of the value of the unimproved land or by ceding one-third of their land to the government and receiving fee title to the balance.

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[19] Principles Adopted by Land Commission on August 20, 1846, reprinted in RLH 1925, at 2124.

[20] *Id.* at 2126.

[21] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722-23 (1864).

The division and distribution of land amongst the chiefly class notwithstanding, the statutes and awards consistently provided that the grants of title were subject to the rights of tenants on the land.

Finally, the Kuleana Act of 1850 allowed for the granting of fee simple title to the native tenants for the small parcels of land they occupied (*kuleana*).[22] A kuleana parcel usually lay *within* the large land holding of the King, the Government or a chief. However, kuleana could *only* include the land which a tenant had actually cultivated, plus a house-lot of not more than a quarter of an acre. The native tenant was required to pay for a survey of the land and present the testimony of two witnesses concerning his right to the land. Approximately 7,500 Land Commission Awards involved kuleana lands, but only twenty-six percent of the eligible native population received awards.

By the time the Land Commission's work ended in 1855, over one and one half million acres had been distributed to the chiefs or konohiki, nearly one and one half million acres had been set aside as Government Lands, approximately one million acres had been retained by the King and less than 30,000 acres had been claimed by the commoners.[23]

As the rights of the Hawaiian People in land diminished, the rights of Westerners increased. An 1846 law authorized sales of Government Land and, by May of 1850, over 27,000 acres of land had been sold.[24] Under 1850 legislation, any resident of Hawaii was allowed to own and convey land, regardless of citizenship.[25]

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[22] Act of August 6, 1850, reprinted in RLH 1925, at 2141-42.

[23] 1 KUYKENDALL, *supra* note 12, at 294.

[24] J. HOBBS, HAWAII, A PAGEANT OF THE SOIL 54 (1935).

[25] Act of July 10, 1850, reprinted in RLH 1925, at 2233-34.

Within fifty years after the Mahele, large-scale plantation agriculture and the drive for acquisition of land by the plantation owners spawned a wide-spread loss of land ownership and control by the Hawaiians.

> With a permanent population of fewer than two thousand, Westerners took over most of Hawaii's land in the next half-century and manipulated the economy for their own profit. They had already stripped the land of its only readily exploitable resource, sandalwood. After the Reciprocity Treaty of 1876, which allowed Hawaiian sugar to enter the United States duty-free, Western-owned sugar plantations dominated the Hawaiian economy. That the local population did not participate in this economy proved no obstacle; laborers were imported from the Orient and Europe. By the turn of the century Hawaiians were a minority in their own homeland.[26]

The ancient land divisions worked well for a plantation economy and control of several ahupua'a provided the basis for a plantation's operations. The extensive level areas with rich soil in midlands were planted and sugar's insatiable thirst was served well by up-land water supplies brought down the slopes by gravity-fed ditches. Harvested crops were taken out by boats serving coastal harbors.

Many kuleana were lost as a result of changes in the economy and the Hawaiian's failure to understand the foreign legal and institutional systems. Hawaiian farmers could not earn a subsistence living on their small plots of land without the right to pasture their animals or grow crops on unoccupied portions of the ahupua'a. Some kuleana lands that had been leased to Westerners were simply never returned, and others were lost to surrounding landholders through adverse possession.

The chiefs were likewise unable to retain their lands. The great majority of them were heavily in debt by the

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[26] LEVY, *supra* note 7, at 858 (footnotes omitted).

1840's. Sandalwood was gone and the only thing of value left was land. Debts to Westerners were paid in land, attempts at large-scale agriculture failed and large estates were lost through foreclosures.[27]

Government land was also lost to others. By 1893, 613,233 acres of land had been sold by the Kingdom; the bulk of the land ultimately going to Westerners.[28]

The King's lands were freely sold by the successive monarchs. In 1855, Kamehameha IV, for instance, is said to have sold the entire ahupua'a of Waihe'e on the Island of Oahu for $48.00. When Kamehameha IV died intestate, his widow claimed her intestate share and dower rights in his land. The Hawaii Supreme Court held that those lands did not descend to the *heirs* of the King, but rather descended to the successors to the *throne*. Each successor, had the right to dispose of the land as if it were his private property.[29] By the Act of January 3, 1865, the King's lands were designated as "Crown Lands" and the same were declared inalienable, to descend to the successors to the Hawaiian crown forever.[30]

As the plantation economy flourished, plantation owners secured long-term leases on large tracts of Government and Crown Lands. The 1890 census (the last taken before the overthrow of Hawaii's monarchy) revealed the extent to which land had been secured by American and European residents. Of a total population near 90,000, fewer than 5,000 actually owned land. The relatively small number of Westerners owned over one million acres. Although 3 out of 4 landowners were Hawaiian, 3 out of 4 acres belonging to private owners were held by Westerners.[31]

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[27] *Id.* at 860.

[28] *Id.* at 859.

[29] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. at 725.

[30] Act of January 3, 1865, § 3, reprinted at RLH 1925, at 2178.

[31] L. FUCHS, HAWAII PONO: A SOCIAL HISTORY 251 (1961).

While the Hawaiian was being rendered landless, political intrigues were leading inexorably towards his becoming nationless as well. Inside the little Kingdom, resident foreigners, especially Americans, pressed for greater political power to the resident population and complementary reductions of the sovereign's power. In 1852, Kamehameha III proclaimed a new constitution which truncated his powers by requiring that the Privy Council and Prime Minister approve certain acts of the King. Kamehameha IV chafed under this constitution and Kamehameha V abrogated it, signing a new one in 1864.[32]

The 1864 Constitution restored some of the monarch's powers. After Kamehameha V's and King Lunalilo's short reigns, King Kalakaua came to the throne in 1874. By 1887, Kalakaua had yielded to demands and appointed a new cabinet which would write a new constitution; the so-called "Bayonet Constitution of 1887," which virtually reduced the King to ceremonial status.

The King's military power was placed under legislative control, his executive powers were transferred to a cabinet appointed by him, but answerable only to the legislature, and the House of Nobles was converted to an elective body by the 1887 constitution. The privilege of voting was extended to foreign resident males, regardless of citizenship, and two classes of voters were established: one of which could vote only for Representatives and the other which could vote for Representatives *and* Nobles. Property qualifications for voting were set so high that many Hawaiians were effectively disenfranchised.[33]

In 1892, Queen Liliuoukalani succeeded to the throne. Like Kalakaua, she felt that the 1887 Constitution not only unreasonably limited the monarch's prerogatives, but also put too much power in the hands of resident Westerners, many not even citizens of Hawaii.

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[32] R. KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM 27 (1940).

[33] *Id.* at 50.

On January 14, 1893, Liliuokalani was prepared to declare a new constitution to restore some of the Crown's powers and require that the vote be reserved to citizens (natural born or naturalized).[34] When word spread of the Queen's new constitution, a "Committee of Public Safety" was formed. It was made up of thirteen members of a club called "The Annexation Club" which had been formed a year or so earlier.

Representatives of this Committee visited the U.S. Minister to Hawaii, John L. Stevens, to seek his support. Stevens replied to the request by stating that the troops on board the *U.S.S. Boston*, anchored in Honolulu Harbor, "would be ready to land any moment to prevent the destruction of American life and property, and in regard to the matter of establishing a Provisional Government, they of course would recognize the existing government whatever it might be."[35] That evening, Committee members formulated plans and drafted documents for a provisional government.

On January 15, 1893, the Committee pressed the Queen by informing members of her cabinet that they intended to declare the throne vacant. The Queen relented, saying that she would *not* install the new constitution.

Nonetheless, on Monday, January 16, 1893, accusing the Queen of "revolutionary acts" (no less), the Committee appealed to Minister Stevens for United States military aid.[36] Public meetings were held that day and, late in the day, a company of United States Marines was landed from the *Boston*. Alarmed, the Queen sent a note to Minister Stevens, but received no reply.[37]

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[34] 3 R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874-1893, at 585-86 (1967).

[35] J. BLOUNT, HAWAIIAN ISLANDS, Exec. Doc. No. 47, 53rd Cong., 2d Sess. 497 (1893).

[36] *Id.* at 118.

[37] 3 KUYKENDALL, *supra* note 34, at 593-96.

By January 17, 1893, the Committee of Safety had completed its statement deposing the Queen and a volunteer army had been ordered to assemble. Members of the Committee proceeded to the government building where they took possession without a struggle. From the steps of the building, a proclamation was read declaring that the existing government was overthrown and a provisional government established in its place. The insurgents immediately requested and obtained recognition from Minister Stevens.[38]

Liliuokalani, herself, wrote this account of that day:

> At about two-thirty P.M., Tuesday, the establishment of the Provisional Government was proclaimed; and nearly fifteen mintes later Mr. J. S. Walker came and told me "that he had come on a painful duty, that the opposition party had requested that I should abdicate." I told him that I had no idea of doing so. . . . I immediately sent for [my cabinet ministers and advisors]. The situation being taken into consideration, it was found that, since the troops of the United States had been landed to support the revolutionists, by the order of the American minister, it would be impossible for us to make any resistance.[39]

As night fell, Liliuokalani, in order to avoid bloodshed and under protest, surrendered to th. "superior forces of the United States."[40] The provisional government, led largely by Americans, took over Hawaii, leaving the Hawaiians without a homeland.

The complete breakdown of the ahupua'a and its societal structure had caused the Hawaiians to relocate into newly urbanized areas or in other ways to dislodge themselves from the lands they had cultivated for hundreds of years.

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[38] *Id.* at 601.

[39] LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 387 (12th ed. 1976).

[40] *Id.*

The land, as the centerpiece of their culture, was no longer theirs. The nation, with warrior Kings and powerful chiefs and chiefesses at its head, was now also gone. The Hawaiian culture, with its beautiful language, its poetic chants and songs, its intricate dances, its all-important folklore and genealogies, its arts and crafts, and its agrarian expertise was next to go.

The Hawaiian language had been the official language of the Monarchy even while the intensity of Western contact grew. Surely, the commercial language of greatest prevalence was English, but Hawaiian persisted as the official language of the Hawaiian government, as long as *it* existed. Then, when Hawaii became a United States Territory, even Hawaiian's usage as the official language ended.

The shift from heavy usage of Hawaiian to an obligatory use of English, combined with the influx of non-English speaking immigrants from around the globe, resulted in a loss of general fluency in the Hawaiian language and an incomplete learning of English.

> In part, the demise of the Hawaiian language came from a Territorial policy banning the use of the Hawaiian language in schools, ostensibly to improve the mastery of English. The loss by itself might not have been harmful culturally if, indeed, [Hawaiians] mastered English and used that medium to carry the Hawaiian features of the nineteenth-century contact culture into the twentieth century. In the case of religion, such occurred. [Hawaiians] generally converted to Christianity and used that form of organized religion to express their unique Hawaiian spirituality. But in language no true substitution occurred. Rather, a "lingua franca" (pidgin English) evolved, lacking the structure and breadth to express the varied nuances of thought.[41]

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[41] Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psychocultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B.J. 3, 10 (1983) (footnote omitted).

Anthropology tells us of the importance of a language to a culture. Obviously, a language is fused irretrievably with the culture from which it springs. It is also obvious that cultural concepts cannot be expressed without the use and understanding of the language best designed to articulate them.

In the days following the overthrow of the Kingdom, a strong emphasis was placed officially upon the "Americanization" of Hawaii. Politically, the leaders of the provisional government (who became the leaders of the Republic of Hawaii) needed to show that Hawaii would be ripe for annexation.

To stress Americanism and downplay the importance of any of the other cultures (and certainly the *native* one) was of total importance. Thus, from 1893 until Hawaii became a State in 1959, a major policy of its government was to prove beyond a reasonable doubt that Hawaii, despite its multicultural population, was just another slice of America.

To do this, the efficacy and influence of the Hawaiian culture had to be drastically reduced. It was necessary to debilitate the Hawaiian culture. The same was true of the immigrant cultures represented in Hawaii. Those cultures also felt the impact. Happily for them, transfusions of fresh cultural knowledge and experiences were readily available from their homelands. For Hawaiians, the *source* of their culture was the primary target of these attacks. This *was* their homeland. *Where* was the cultural replenishment expected to come from?

The whole *existence* of the Hawaiians as a People complete with a culture, a standing, an ethnic foundation, was in jeopardy. Actually, the loss of the Hawaiian Culture by Native Hawaiians and Hawaiians was nearly complete. That, together with the loss of land and loss of sovereignty, added up to a complete loss of *status*.

> The immediate result, *loss of status*, continues to plague [Hawaiians] to the present day. A *loss of pride in culture* subsequently occurred. Loss of cultural pride was already manifest during the development of a contact culture, but after the overthrow, such loss became widespread and traumatic. In this period, the *loss of language* (and its ability to give special expression to cultural nuances) became almost total. However, the *loss of land* which severed [Hawaiians] from a fundamental source of their identity, triggered what may be called a cultural *identity crisis*. From these losses and perhaps in response to this crisis, there *emerged an outsider's culture* which, for all practical purposes, further removed many [Hawaiians] from their original cultural roots. Collectively these six experiences are the content of a Hawaiian cultural trauma.[42]

II. THE PRESENT LOT OF THE HAWAIIAN PEOPLE

During 1983, two comprehensive reports concerning the present condition of the Hawaiian People were published.

The first of these is the Native Hawaiians Study Commission's *Report on the Culture, Needs and Concerns of Native Hawaiians* (1983) to the U.S. Senate Committee on Energy and Natural Resources and the U.S. House of Representatives Committee on Interior and Insular Affairs, made pursuant to Public Law No. 96-565, 94 Stat. 3321, *et seq.* (1980), 42 U.S.C. § 2991 (1980), hereinafter called "NHSC Report."

The other is the Native Hawaiian Educational Assessment Project's Report to the U.S. Secretary of Education (1983), mandated by Public Law No. 96-374, 94 Stat. 1499 (1980), 20 U.S.C. § 1221-1, hereinafter called the "Educational Assessment Report."

Each of these reports contains lengthy discussions of certain statistics which reflect upon the welfare of Native Hawaiians and Hawaiians today.

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[42] *Id.* at 6.

We learn that in 1778, the population of Hawaii was estimated at some 300,000 (virtually all, of course, Native Hawaiian) and that, during the next one hundred years, the population of Hawaiians (including Native Hawaiians) declined to approximately 47,500.[43] The nadir in the Hawaiian population (34,000) was reached in 1893. At the turn of this century, fortunately, the Hawaiian population began to increase rapidly. By 1980, there were over 175,000 Native Hawaiians and Hawaiians.[44] This is a young population. In 1980, the median age for males was 22.00 and for females 23.2.[45]

The percentage of Native Hawaiians and Hawaiian children between the ages of 14 and 17 who enrolled in school in 1970, however, was the lowest of any group in Hawaii.[46]

Only 46.9 percent of all persons of Hawaiian ancestry over 25 years of age had graduated from high school and only 4.6 percent had completed four or more years of college.[47]

Ethnically related employment rates are linked to educational levels. The low levels of educational achievement noted above carry forward into employment figures. According to the 1970 U.S. Census, 4.3 percent of Hawaiian men and 5.2 percent of Hawaiian women in the civilian labor force were unemployed in 1970.[48] These figures compare with 2.6 percent for men and 3.7 percent for women for the State of Hawaii overall. The unem-

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[43] 1 NATIVE HAWAIIANS STUDY COMMISSION, U.S. DEPT. OF INTERIOR, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 68 (June 23, 1983).

[44] *Id.* at 70 (Table 6).

[45] *Id.* at 70 (Table 7).

[46] *Id.* at 78.

[47] *Id.* at 47.

[48] *Id.* at 76.

ployment rate for Hawaiian men was also higher than the average U.S. rate (3.9 percent).

> The unemployment rate for [Hawaiian] males was significantly higher than that for the Japanese, Chinese, Filipino, and White groups. Japanese men had the lowest unemployment rate at 1.4 percent. [Hawaiian] women also had a higher unemployment rate than other ethnic groups, except for the White group.
>
> The percent of [Hawaiian] males in the labor force, 76.4 percent, was similar to that for the Chinese, Filipinos, and the average U.S. rate. It was lower than the percentage for the State as a whole, 81.5 percent, for Japanese, 79.7 percent, and for Whites, 86 percent. However, it should be noted that almost 45 percent of the White male labor force was in the armed forces.[49]

Based on data from a *1975* Census update survey of the Office of Economic Opportunity, the estimated unemployment rate for Hawaiians was 11.6 percent compared with 6.5 percent for the State of Hawaii as a whole.

The employment rates quoted above, while telling, are *quantitative* in nature. They do not allow us to make a *qualitative* analysis of the employment enjoyed by Hawaiians. Data for 1975 distributed by men employed in the occupational structure of Hawaii show that Hawaiians still lag behind other ethnic groups. Only 17.8 percent of Hawaiians are classified as "professional-technical, managerial," compared to 33.6 percent for Caucasians, 34.3 percent for Japanese, and 50.4 percent for Chinese. On the other hand, 53.6 percent of Native Hawaiians have occupations classified as "blue collar," while 42 percent of Caucasians, 42.2 percent of Japanese and 21.2 percent of Chinese have blue collar jobs. It should be noted that Filipinos and Portuguese fare even worse than Hawaiians: 16 percent of Filipinos and 17.7 percent of Portu-

[49] *Id.* at 49.

guese are classified as professional, while 55.4 percent of Filipinos and 58.1 percent of Portuguese have blue collar jobs. Over 22 percent of Hawaiian men have jobs in the "menial" occupational category, a higher percentage than that of any of the other five ethnic groups studied.[50]

It follows, of course, that lower income levels would be enjoyed by those in lower echelon jobs. Accordingly, 1977 median income levels enjoyed by Hawaiians were lower proportionately than other ethnic groups. Here, there are figures for "pure Hawaiian" and "part Hawaiian," which are not directly equivalent to Native Hawaiian and Hawaiian, respectively:[51]

Chinese	$21,183
Japanese	19,431
Caucasian	19,005
Part-Hawaiian	13,615
Filipino	12,683
Pure Hawaiian	9,278

In 1975, 41,483 Hawaiians, or about 27 percent, were classified as below the poverty level. In 1982, when Hawaiians comprised approximately 12 percent of the total state population, they made up a significantly higher percentage of those on welfare (AFDC-UP: 30.8 percent; General Assistance: 22.1 percent).[52]

The experience of Hawaiians in the criminal justice system is also telling. The percentage of Hawaiian adults arrested in 1981 was much greater than the Hawaiian percentage share of the population (23 percent versus 12 percent). The percentage of Hawaiians arrested for specific crimes was also, in many crime categories, larger than their share of the population. The data related to

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[50] *Id.* at 50.

[51] *Id.* at 51.

[52] *Id.* at 79.

Hawaiian juveniles arrested in 1981 was even more striking. Hawaiian juveniles comprised the largest percent of those arrested for *every* crime examined, from murder to running away.[53] In a recent study of incarceration, a researcher found that nearly 60 percent of the prison population in the State of Hawaii was Hawaiian.[54]

The impact of Western diseases on the Hawaiians was historically devastating. Waves of epidemics reduced the estimated contact population of 800,000 in 1778 to 34,000 by 1893. At the turn of this century, acquired immunity and inter-marriage, however, was reversing this trend. Demographic trends now indicate that the population had reached its lowest level in the final decade of the 19th century, would stabilize for about twenty years, and then begin a dramatic recovery.

Today's Hawaiian population is comparatively young and numbers an estimated 175,000 individuals.

> The health characteristics of this group, however, are adversely and consistently affected by mental health disorders, stress-related diseases, and an absence of culturally-sensitive health professionals.
>
> As developed in depth within the body of this study, the following findings are offered:
>
> - the psychological despair and sense of being a conquered people in their own homeland is a factor in the health conditions of [Hawaiians];
> - [Hawaiians] have the lowest life expectancy of any ethnic group in the State of Hawaii: 67 years compared to a Statewide average of 74 years;
> - the leading causes of death for [Hawaiians], in order of prevalence, are heart diseases, cancers, stroke and accidents;

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[53] *Id.* at 80.

[54] *Id.* at 53.

- [Hawaiians] have the highest infant death rate in the State of Hawaii: 14 per 1,000 live births compared to a statewide average of 10 per thousand;
- mental health assessments indicated that [Hawaiians] have a higher-than expected incidence of personality disorders, mental retardation, and drug abuse than their proportion of the population; and
- suicide rates among [Hawaiian] males (statistics are unavailable for females) is the highest in the State of Hawaii; 22.5 per 100,000 in the population, compared to a rate of 13.5 for males of all races in Hawaii—rates in the 20-34 year age group of [Hawaiians] were even higher.

[Hawaiians] continue to experience a form of fatal impact usually associated with the last century. Neither Hawaiian nor Western medicine has effectively halted the damage.[55]

Reviewing the statistics discussed above, one can assay the lot of Native Hawaiians and Hawaiians today. The huge, vibrant native population found in Hawaii by the first Westerners in 1778 was reduced to about one-tenth its size in a scant 115 years. Between 1893 and 1983 that population, including all Pure Hawaiians (9,366) and Part-Hawaiians (166,087), has yet to reach its 1778 level (300,000). Good health and its practice continues to evade Native Hawaiians and Hawaiians. The Hawaiian People have appeared at the bottom of all of the indicators of success in a modern American society for years, perhaps most of this century. There seems to be a reduced impetus amongst Native Hawaiians and Hawaiians to do anything about it. Young Hawaiians have few role-models

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[55] 2 NATIVE HAWAIIANS STUDY COMMISSION, U.S. DEPT. OF INTERIOR, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 149-50 (June 23, 1983).

which encourage their personal efforts to excell and succeed in the society which is Hawaii today.

United States Senator from Hawaii Daniel K. Inouye is quoted as saying, a few years back:

> Two years ago, I visited Nanakuli High School, located right in the middle of Hawaiians Homes land. Over 90 percent of the students were Hawaiians. Yet their teachers were Chinese, Japanese, [Caucasian], and one Filipino. The only Hawaiians in evidence were the janitors, the food service employees, the guards and maintenance crew. There was no Hawaiian history course except the one that the Filipino teacher offered after school on a voluntary basis. Her text for the class was James Michener's *Hawaii*.
>
> I ask you to imagine how the Hawaiian child feels when he sees the adults of his race cleaning yards, collecting garbage, washing dishes—when he sees—that few are teachers, lawyers or doctors, even if all the pursuits are honorable and necessary tasks.[56]

What needs to be done to improve this dismal picture? The Native Hawaiian Educational Assessment Project set out to study the statistics and arrive at findings which would answer that question. The major recommendations of the Project are as follows:

> I. Continue to emphasize Basic Skills; build upon success with lower-achieving students; build success for potential higher-achieving students.
>
> • • • •
>
> II. Develop interagency programs aimed at individualizing support for Hawaiian students and families with special needs.
>
> • • • •
>
> III. Support Hawaiian and Multi-cultural Studies.
>
> • • • •

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[56] NATIVE HAWIIAN EDUCATIONAL ASSESSMENT PROJECT, FINAL REPORT TO THE U.S. SECRETARY OF EDUCATION 101 (July 1983).

> IV. Conduct further research into educational needs related to the unique cultural situation of [Hawaiians].[57]

Where would one implement these recommendations? Certainly, you say, in the public schools of Hawaii! Unfortunately, the Educational Assessment Report contains many references to the severe problems being experienced by the State Department of Education in trying to cope with the special educational needs of Hawaiian youngsters. In fact, according to the study, the Department in itself is a major part of the problem.

> The Public Education system in Hawaii represents and propounds a cultural definition different from Hawaiian culture. It is infused with values and activities originating in America, or in the "Western" tradition. It is currently administered and taught by a staff disproportionately Japanese. The pattern has been called "institutional racism." The nature of the institution of school lends itself to a vicious cycle in which the groups who succeed best become those who run the system, which further decreases the chances for other groups' success. The bias is felt throughout the system, from the selection of books and materials to the social organization of the classroom.
>
> * * * *
>
> Many individuals see the basic problem for Hawaiians in the area of education as being the fundamental mismatch between Hawaiian cultural traditions and the Western educational system as it has evolved in the United States and throughout the world. . . .[58]

It is submitted that the educational programs and services operated with great effectiveness by The Kamehameha Schools and funded by the trust for which

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[57] *Id.* at x-xi.

[58] *Id.* at 169.

Appellees herein are the trustees may offer substantially the most important solution to the problems faced by Native Hawaiians and Hawaiians today.

The Kamehameha Schools serve 2,850 full-time Hawiian students on-campus, and more than 33,000 Hawaiian students in the public schools. In addition, the Schools offer thousands of other Hawaiians enrichment programs, ranging from live-in summer programs for elementary school students, to practical programs for adult Hawaiians, such as courses for expectant mothers.

Based on the findings and recommendations of the Native Hawaiian Educational Assessment Project, the Appellees are embarking upon even broader programs of enormous worth to the Hawaiian People.

III. THE ROLE OF APPELLEES EQUIVALENT TO THAT OF KONOHIKI OF OLD

The loss of their lands and their sovereignty experienced in the last century by Native Hawaiians and Hawaiians is discussed at length above. To many Native Hawaiians and Hawaiians, the lands bequeathed by Princess Bernice Pauahi Bishop, the lands of the Kamehameha family, "belong" to *them* in the sense expressed in the Hawaiian culture of pre-contact times. The Appellees, they reason, are but Konohiki for Ali'i Pauahi. As they hold her lands in trust, so did the konohiki of olden days hold the lands left in *their* charge in a sacred trust.

What a travesty it would be, they say, to breach that trust and take the land away, for these lands do not belong to the Appellees nor to the settlor of this great trust but to all of Princess Pauahi's people, the Hawaiian People.

SUMMARY OF ARGUMENT

Act 307, Session Laws of Hawaii 1967, now codified in part as Hawaii Revised Statutes Chapter 516, contains a preamble entitled "Findings and Declaration of Neces-

sity" which is nominally a legislative justification for passage of the Act, and speaks of an alleged social problem in land ownership perceived by the legislators. It says the need for single-family residential lots is critical and attributes this scarcity to a concentration of ownership of land in "the hands of a few." The public purpose of the Act is said to be the curing of this social problem. Chapter 516 applies only to "lands leased as residential lots," occupied as residential property and contained within a "development tract." In no way can any application of the Chapter develop or encourage the development of any *new* residential property. If a scarcity of developed residential land indeed exists, then the State of Hawaii, which is the largest landowner of all, must be the greatest culprit of all, and *its* land should be taken. Instead, Chapter 516 attacks the last vestige of Hawaiian land—the revenues from which are used to educate Hawaiian children—and transfers that land to well-to-do lessees.

ARGUMENT

Act 307's impassioned preamble states that "present-day land ownership in the State [of Hawaii] is characterized by a concentration of fee title to lands in the hands of a few." It expounds that "[a]t least three-fourths of all privately held land in the State are (sic) currently owned by this small group of owners," and opines that "[m]uch of this land is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical." Finally, the preamble confidently asserts:

> The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice

> to own or to take leases to the land on which their homes are situated.[59]

This justification for the challenged statute is spurious.

The very federal legislation which accorded Hawaii statehood, the Admissions Act, Pub. L. 86-3, 73 Stat 4 (1959), contains a challenge to the government of Hawaii relative to the availability of home ownership. Interestingly, it follows immediately an important reference to the betterment of conditions of Native Hawaiians. This federal legislation is Section 5(f) of the Admissions Act, which provides (in pertinent part):

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and the public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, *for the development of farm and home ownership on as widespread a basis as possible*, for the making of public improvements, and for the provision of lands for public use. . . . (Emphasis supplied)[60]

The ceded lands referred to in Section 5(f) not only generate large amounts of State revenue each year but are themselves available for development into residential lots. These ceded lands, by the way, are only a part of the 36.5 percent of all of the lands in Hawaii owned by the State government of Hawaii.

It is submitted that, if the scarcity of developed residential property has in fact been caused by a "concen-

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[59] 1967 Haw. Sess. Laws Act 307, § 1(f).

[60] Hawaii Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

tration of ownership . . . in the hands of a few," then the largest land owner of all, the State of Hawaii, must be the greatest culprit of all.

Chapter 516 applies only to "lands leased as residential lots" occupied as residential property and contained within a "development tract." [61] Yet, the Act 307's preamble clearly states that the legislative purpose for the enactment of the Chapter was to attack the problem brought on by "population growth" and "increase in demand for residential lots." In no way can any application of Chapter 516 develop or make available any new residential lots not now already developed. Under the most basic economic principles, so long as the supply of a commodity remains the same while the demand for it increases, it is likely that one result will be an increase in the price of that commodity.

The scarcity of supply spoken of in the preamble appears to be the scarcity of developed residential lots. The statute by its own terms is not designed to effect or even encourage an increase in the supply of residential lots so as to meet demand and reduce prices. It is patently clear from a reading of the Chapter that the only purpose that the Chapter *can* fulfill is to convert *leasehold* residential lots to *fee simple* residential lots. It is submitted that those results will do absolutely nothing to reduce the cost of housing in Hawaii.

Actually, after acquiring the fee simple title under Chapter 516, a lessee will have substantially more invested in his lot. He will have to demand an even higher price for it when and if he should sell it. Thus, it would seem the process provided for under the Chapter will have the tendency to *increase* the cost of residential property, *not* decrease it.

Taking one person's private property in eminent domain simply to convey it to another person is not a "public

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[61] HAW. REV. STAT. § 516-2 (1976 repl.).

purpose" under anyone's definition. That is the only result assured by the challenged statute. In each case, the lessee, desirous of owning the fee simple interest in the land, applies under the statute to Appellant Hawaii Housing Authority. That agency condemns the interest from Appellees and sells the interest to the lessee. That is the total effect of the statute. There is no other effect.

Here, also, it must be kept in mind just who are the beneficiaries of Chapter 516. We are not dealing with poor, downtrodden tenants subjugated by a moustache-twisting and villanous landlord. Appellant associations represent affluent lessees who own expensive leasehold residential properties in the best neighborhoods of the City and County of Honolulu. Appellees are the trustees of a Native Hawaiian princess' only legacy to her people, left to them just at the time the rest of their world crumbled around them. If the roles were somehow reversed, or if Chapter 516 used the power of eminent domain to acquire land for a worthy purpose such as, for example, running a school for a disadvantaged group of citizens, then perhaps a public purpose argument could readily be made. Those are *not* the facts here, of course.

Your amicus is painfully aware of the role that the lands for which Appellees are the trustees must play in the betterment of the condition of Native Hawaiians and Hawaiians now and in the future. To reverse the lower court and uphold the statute would not, perhaps, cause an immediate and devastating crippling of the trust or the programs of the Schools described above. It is submitted, however, that it has taken us over two hundred years to arrive at the conclusion that Native Hawaiians and Hawaiians need special educational programs. How ironic it would be to start weakening the greatest source for such programs at this turning point in the history of the Hawaiian People.

CONCLUSION

For the reasons presented here, and those presented by Appellees herein, the Judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The Hawaii Land Reform Act, Hawaii Rev. Stat. Ch. 516 (HLRA), is intended to accomplish the redistribution of private ownership of property through the use of the state's power of eminent domain. While just compensation is theoretically available, property owners are forced to make what amounts to involuntary private land transfers. The state should not be free discriminatorily to use its eminent domain power on behalf of selected private groups or individuals. The right to own and retain property is as entitled to reasonable legal protection as the right to obtain just compensation when condemnation is required for a truly public use.

Under traditional Fifth Amendment interpretations, government may only take property for a "public use" or purpose with the goal of putting the property to a new or different use than it would serve absent the taking. HLRA does not meet this standard. While government may need broad powers to obtain property for the good of the people, it should not be free to lend or sell its eminent domain power when the result is intended only to benefit favored classes, not the general public. The power to force private land transactions is too important and coercive to be justified where the benefit to the public is incidental or occurs solely because the coerced transfer brings some sense of satisfaction to the private transferees.

If the private land transfer scheme established by HLRA is validated, then the "public use" requirement of the Fifth Amendment will cease to provide meaningful protection to private property owners. PLF believes that the decision of the Ninth Circuit in *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), puts a welcome and necessary cap on the soaring and open-ended dicta of *Berman v. Parker*, 348 U.S. 26 (1954), and believes that absent such limits on what may be considered a "public use" for purposes of eminent domain, private citizens will be all but powerless to resist condemnations which chiefly serve purely private interests.

Pacific Legal Foundation believes that its position, in support of private property rights, has broad public support, and that its public policy perspective will help it provide this Court with a more complete briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed amicus curiae briefs in *San Diego Gas &*

Electric Co. v. San Diego, 450 U.S. 621 (1981); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom., Lyon v. California*, 454 U.S. 865 (1981); *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981); and *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288 (1982), *cert. granted sub nom., Summa Corp. v. State of California, ex rel., State Lands Commission and City of Los Angeles*, No. 82-708 (October Term, 1982).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 702 F.2d 788 (9th Cir. 1983). A copy of the opinion is reprinted as Appendix A to the Hawaii Housing Authority's Jurisdictional Statement.

STATEMENT OF THE CASE

The initial version of the Hawaii Land Reform Act, Hawaii Rev. Stat. Ch. 516, was enacted in 1967 "to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots."[1] In 1975, the Hawaii Legislature sought to strengthen HLRA's pretensions of constitutional validity by finding that the fee simple ownership of residential land in the state was concentrated "in the hands of a few landowners,"[2] that those landowners engage "in the practice of leasing their lands under long-term leases,"[3] and that this

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[1]Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Senate Journal 800; Conf. Comm. Rep. No. 18 on S.B. No. 1128 (Act 307) 1967 House Journal 859.

[2]Hawaii Rev. Stat. § 516-83(a)(1).

[3]*Id.*

practice has resulted in a shortage of "fee simple residential land"[4] and led to the "inflationary trend of land."[5] Beginning in 1978 the Hawaii Housing Authority (HHA) began involuntarily condemning private property pursuant to HLRA and extensive federal and state litigation ensued.

Under HLRA, proceedings to condemn may be commenced after lessees of at least 25 residential lots or 50% of such lots (whichever is less) in a "development tract" (a residential development not less than five acres in size) have applied to HHA to purchase the fee interest in their leased lots;[6] proceedings are never commenced on the state's initiative (although HHA may acquire a fee interest in some of the lots under certain circumstances).[7] Interestingly, applicant-lessees must, among other things, have a bona fide intent to live in the development tract or in Hawaii (thus apparently recognizing that these lessees may go on to rent the residences themselves).[8] Applicant lessees must put down a deposit for, and pay, the condemnation expenses incurred by HHA and the value of the property condemned.[9] In the condemnation action the lessees are named as parties and title is transferred to them.[10] Under HLRA, HHA can condemn entire development tracts or specified lots within tracts.[11]

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[4]Hawaii Rev. Stat. § 516-83(a)(2).

[5]Hawaii Rev. Stat. § 516-83(a)(7).

[6]Hawaii Rev. Stat. §§ 516-22 and 516-1(2).

[7]Hawaii Rev. Stat. § 516-22.

[8]Hawaii Rev. Stat. § 516-33(2).

[9]Hawaii Rev. Stat. § 516-33(4).

[10]Hawaii Rev. Stat. § 516-30.

[11]Hawaii Rev. Stat. § 516-22.

In *Midkiff v. Tom*, 471 F. Supp. 871 (D. Hawaii 1979), the District Court held that Hawaii may use its power of eminent domain to redefine, remanage, or redistribute interests in land but restrained the use of the valuation formula and compulsory arbitration required by HLRA. In a subsequent decision, *Midkiff v. Tom*, 483 F. Supp. 62 (D. Hawaii 1979), the District Court granted summary judgment against the property owners, refusing to hear evidence offered to refute the factual findings of HLRA, and holding "that land redistribution constitutes a permissible public purpose encompassed by the police power." 483 F. Supp. at 69. Alternatively, the court also held that the Legislature's economic findings demonstrated that the Legislature had not acted arbitrarily in enacting the statute, stating: "In order to prevail, plaintiffs must demonstrate that the statute is arbitrary with respect to every possible economic rationale for the statute—stated and unstated." 483 F.Supp. at 70.

On appeal, a panel of the Ninth Circuit reversed and remanded the District Court's decision stating (per Judge Alarcon):

> "We must decide whether the Federal Constitution permits a state to take the private property of A and transfer its ownership to B for his private use and benefit. It is our view that it was the intention of the framers of the Constitution and the fifth amendment that this form of majoritarian tyranny should not occur." *Midkiff v. Tom*, 702 F.2d at 790.

In a lengthy and strong dissent, Judge Ferguson characterized HLRA as a "program of residential land reform" and argued that "[a]bstention, and, failing that, deference to legislative judgment, was uniquely appropriate in this case . . . ." 702 F.2d at 809.

SUMMARY OF ARGUMENT

1. Constitutional protections of personal rights in property are fundamental and should not be diminished or waived on the strength of legislative declarations.

2. The probably unplanned, but nonetheless steady and systematic, gutting of the "public use" requirement of the Fifth Amendment has led Hawaii to the point where, absent the judicial resurrection of the intended meaning of the "public use" requirement, the state has come to expect that it will be able to lend its power of eminent domain to favored private citizens to obtain fee simple title to the property of others so long as "proper" findings are declared. Erosion of the "public use" limit on the eminent domain power should not be allowed to proceed so far as to allow coerced private land transfers having only psychic or incidental public benefits. "Public use" should be measured by results, or at least planned results, not by mere declarations.

3. Validation of the Hawaii Land Reform Act would imperil interests in property other than land.

4. Hawaii should not be able to use its eminent domain power discriminatorily to create a superior class of residential landowners from the Balkanized landholdings of the present owners.

ARGUMENT

I

PROTECTION OF PERSONAL RIGHTS IN PROPERTY IS A FUNDAMENTAL PRECEPT OF THE FEDERAL CONSTITUTION AND HAS EQUAL APPLICATION TO ISLAND STATES

The Constitution not only seeks to establish a democracy, but also to create a framework in which democracy can survive and even thrive. Of equal general importance, and of particular significance in these cases, the Constitution, in its Bill of Rights and elsewhere, sets limits on what government or a majority may do to individual citizens or minorities. Thus, the Constitution also establishes protections from popular, but improper, abuses. One of these limits is that the government may not take private property without just compensation nor may it be taken for other than a "public use."[12]

For nearly two centuries, American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adoption of the Federal Constitution.[13] In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth Century jurists broadly construed the Contract Clause, United

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[12]U.S. Const. Amendment V: "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

[13]*See* Bernard Siegan, *Economic Liberties in the Constitution* Chapters 2-4 (University of Chicago Press 1980).

States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas,* 123 U.S. 623 (1887).

This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). In particular the Court has recognized that a taking of property causes special, severe injuries:

> "Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165, 1228, and n 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Loretto v. Teleprompter Manhattan CATV Corp.,* ..... U.S. ....., 102 S. Ct. 3164, 73 L. Ed. 2d 868, 883 (1982) (emphasis in original).

However, despite this recognition and the consequent safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property.

Despite this Court's recognition of the "special kind of injury" which occurs when an owner is deprived of his property, Hawaii apparently believes that its particular patterns of landownership provide some form of waiver to otherwise generally applicable constitutional guarantees. Even HLRA's staunch defenders admit that there is an "almost instinctive feeling that the Hawaii Act is radical . . . ." Conahan, *Hawaii Land Reform Act: Is It Constitutional?*, 6 Hawaii B.J. 31, 53 (1969), *cited* in *Midkiff*, 702 F.2d at 808 (dissenting opinion of Ferguson, J.). Rather than face the solid commonsense instincts which give rise to this constitutional queasiness, these defenders suggest that this feeling will go away if the political realities of land reform in Asia and Latin America are considered "if only subconsciously," or if one disposes of the "assumption" that landownership in Hawaii is similar to that "in most parts of continental United States." *Id.* Actually, it is HLRA's supporters who are laboring under an invalid assumption that landownership is more widespread in the continental United States than in Hawaii. In fact, this is not the case:

> "Ownership of land [in the United States], and the associated wealth as measured by the value of land, is concentrated in the hands of a few. Less than 0.5 percent of the largest owners hold 40 percent of the land, while 78 percent of the smallest owners hold about 3 percent of the land." James A. Lewis, *Landownership in the United States, 1978;* Agriculture

> Information Bulletin No. 435, United States Department of Agriculture, Natural Resource Economics Division, at ii.

This very situation, which Hawaii believes justifies its draconian land transfer law, was anticipated by James Madison and used as a reason for providing extra protection against such forced transfers:

> " 'In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property & the public liberty, [will not be secure in their hands] . . . .' " 2 The Records of the Federal Convention of 1787 203-04 (M. Farrand ed. 1911) (footnotes omitted), *cited* in *Midkiff*, 702 F.2d at 791.

Of course, the requirements of the Constitution do not vary geographically or demographically. While the use of private property can sometimes pose difficult social issues, these difficulties can often be resolved by the application of relatively simple principles: (1) the Constitution, while flexible, may not be altered to fit perceived local circumstances, and (2) "public use," if the phrase is other than purely ornamental, must have something to do with use by the public.

II

THE REQUIREMENT THAT A TAKING OF PROPERTY BE "FOR PUBLIC USE" OUGHT NOT TO BE DELETED FROM THE FIFTH AMENDMENT

A. The "Public Use" Requirement Is One of Only Two Restraints on a Very Significant Power

This litigation may well determine whether "public use" continues to survive as a meaningful part of the Federal Constitution, or joins the Ninth and Tenth Amendments.

In essence, the power of eminent domain allows the state to compel the substitution of a judicial proceeding for a market transaction as a means of acquiring property. By its very nature it is a coercive power. Despite this, "[t]he only limitations placed upon the exercise of the right of eminent domain by . . . the United States Constitution (Fourteenth Amendment) are that the taking be for a 'public use' and that 'just compensation' be paid for such taking." *People v. Chevalier*, 52 Cal. 2d 299, 304 (1959). *See also City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 64 (1982). However, as a practical matter

> "[i]t is obvious that in most jurisdictions, the owner opposing the taking of his property for an urban renewal project will have a most difficult time challenging the taking as not being for a 'public use' because it is really being taken for the benefit of the local industrial giant, or for the latest model shopping center, or for almost anything the city council-redevelopment agency visualizes as an aesthetic or economic asset to the city." Molho and Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich* (*Urban Renewal*), 8 Pac. L.J. 627, 694 (1977).

B. The Framers of the Constitution Intended the Phrase "Public Use" to Have Its Plain Meaning

"The federal courts and most state courts have vied with one another in expanding the *Berman* [*Berman v. Parker*, 348 U.S. 26, (1954)] reasoning to the point where the 'public use' limitation has little meaning, if any, as a constitutional guarantee." *Id.* at 695. Historical evidence suggests that this was not the intention of the framers of the Constitution.

From judicial decisions made at the time of the earliest English settlements in the New World, it is apparent that land use restrictions were considered perfectly appropriate so long as they were intended to promote "the public benefit." For example, in *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12, 13 (1606), 77 E.R. 1294, 1295, it was concluded that the King's agents could remove saltpetre from private land in order to make gunpowder for the defense of the realm because "every subject hath a benefit by it . . . for this is for the public, and everyone hath benefit by it." The phrasing certainly suggests the term "public" did not refer to particular individuals or selected segments of the public, but to benefits which extended to "every subject."

State constitutions considered shortly before the adoption of the Federal Constitution attempted to insure the proper interpretation of the phrase "public use" by adding a requirement that the taking also be required by necessity. For example, the first state constitution approved by Vermont's Legislature (but which was not ratified by the people of the state) in 1777 provided, in part, "[t]hat private property ought to be subservient to public uses

when necessity requires it . . . ." Bosselman, Callies, and Banta, *The Taking Issue* 94 (United States Government Printing Office 1973). Similarly, the original Massachusetts Constitution of 1780 provided, in part: "[W]henever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." *Id.* at 95.

Sir William Blackstone's *Commentaries*, which most members of the Constitutional Convention "were familiar with,"[14] took a far stronger view of property rights:

> "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law.*"[15]

Blackstone's description of the public's essential interest in the protection of private rights, as now embodied in our

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[14]David A. Lockmiller, *Sir William Blackstone* 174 (1938). *See also* Richard B. Morris, *The American Revolution 1763-1783: A Bicentennial Collection* 152, 154 (1970).

[15]Robert Malcom Kerr, *The Commentaries on the Law of England of Sir William Blackstone*, 100-09 (1876); 1 Blackstone *Commentaries* at 138-39 (emphasis added).

Federal Constitution, stands in stark contrast with the values embedded in HLRA's findings that, among other things, the "happiness of the people of the State" will be promoted through "[t]he acquisition of residential land" owned by their landlords. Hawaii Rev. Stat. § 516-83(a)(5).

C. Validation of the Hawaii Land Reform Act's Land Transfer Scheme Would Take "Public Use" Beyond Any Reasonable Definition and Render the Phrase Pointless

This Court's decision may well tell if "public use" has so devolved that forced transfers of private land from lessors to lessees qualify because of the "happiness,"[16] "general welfare,"[17] full enjoyment,[18] and "security"[19] which the Hawaii Legislature finds such transfers will bring to the state's lessees.[20] In any event, it is clear that the phrase has come to mean a great deal less than its

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[16]Hawaii Rev. Stat. § 516-83(a)(5).

[17]Hawaii Rev. Stat. § 516-83(a)(8); *see also* Section 516-83(a)(5).

[18]Hawaii Rev. Stat. § 516-83(a)(3).

[19]Hawaii Rev. Stat. § 516-83(a)(5).

[20]The Hawaii Legislature made no findings as to the psychological or other effects of eminent domain on the present landlords, presumably either because it had no interest in the subject, or it would have been inconvenient in light of the legislature's predetermined actions. At least one author who has studied the effects of eminent domain on owners and residents displaced by urban renewal has concluded that "the majority . . . speak of their reactions as expressions of *grief*. These are manifest in the feelings of painful loss, the continued longing, the general depressive tone . . . the sense of helplessness, the occasional expressions of both direct and displaced anger, and tendencies to idealize the lost place." Fried, *Grieving for a Lost Home: Psychological Costs of Relocation* (1963), in *Urban Renewal: The Record and the Controversy* 359-60 (J. Wilson ed. 1966) (emphasis in original).

drafters could have foreseen. In large measure this devaluation of the phrase "public use" has come about through confusion with the police power, expansive interpretation, and blind deference to legislative declarations.

The term "public" in the phrase "public use" suffered an early and drastic contraction in meaning when it was discovered that it did not require that "every subject" be benefited, as the early jurists had concluded, but only that someone be benefited.[21] As early as 1923 this Court had succumbed to a "modern view" of the phrase "public use": "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment." *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923). In case this "modern view" did not leave enough leeway, other courts have been quick to suggest that "public use" is elastic enough to cover any public needs,[22] societal condition or scientific advancement.[23]

Much of this evolution was considerably helped by this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954),

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[21] "It is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use." *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896).

[22] "The concept of public purpose is a broad one. . . . To be serviceable it must expand when necessary to encompass changing public needs . . . ." *Roe v. Kervick*, 42 N.J. 191, 207, 199 A.2d 834, 842 (1964).

[23] "A public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, [and] changing conceptions of the scope and functions of government . . . ." *Barnes v. City of New Haven*, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953).

which began by analyzing whether the District of Columbia Redevelopment Act of 1945 was taking private property for public use, switched into an analysis of the reach of the police power, posited that the definition of the police power was "essentially the product of legislative determinations," and concluded that "[t]he rights of these . . . owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 32, 36. In analyzing the *Berman* decision, commentators have concluded that "in terms of the orderly development of constitutional law doctrines, the court not only thoroughly confused the eminent domain power with the police power, but it failed to spell out the precise limits of this new police power . . . ." *Urban Renewal,* 8 Pac. L.J. at 674. While the intention may have been "to promote urban aesthetics" the decision "substantially limited the effect of the public use doctrine as a limitation on governmental condemnation" leading to the conclusion "that the individual citizen, the small landowner who lacks political influence, has considerably less protection under the fifth and fourteenth amendments to the United States Constitution as a result of the *Berman* decision." *Id.* at 676-77.

Berman's deference to legislative declarations had earlier precedent in the *Rindge* decision: " 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion . . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.' " *Rindge,* 262 U.S. at 709. With the assistance of the *Berman* and *Rindge* decisions, state courts have had no

trouble deferring to purely speculative legislative determinations."[24]

Berman should represent a high water mark in judicial deference to legislative findings. Certainly the *Berman* Court's faith in congressional findings is not merited in this case for several reasons. First, legislatures have grown more sophisticated and have learned to tailor findings to match an intended goal. In other contexts, courts have recognized that government bodies have become astute enough to assert justifications which are acceptable to the judiciary:

> "As overtly bigoted behavior has become more unfashionable, evidence of [discriminatory] intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that [the legislature] . . . intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discretely." *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290) 7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

Second, the bulk of the legislative findings and declarations for HLRA were not part of the original statute as enacted in 1967, but were added subsequently, in 1975. Third, most of the findings consist mainly of psychological and economic speculation which appellees were denied any oppor-

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[24]In *Free State Realty Co., Inc. v. City of Baltimore*, 32 Md. App. 11, 359 A.2d 94 (1976), condemnation was allowed because private property might one day become blighted. In *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962), condemnation of a vacant lot was allowed because it might someday become a slum.

tunity to test. *Midkiff*, 483 F. Supp. at 65. Finally, in *Berman* the redevelopment plan at least made "detailed provisions for the types of dwelling units to be built in the project area. At least one-third of them were to be low-rent housing with a maximum rental of $17 per room per month."[25] *Urban Renewal*, 8 Pac. L.J. at 674. No such detailed plans exist for the sweeping acquisitions authorized under HLRA. The contrasts suggest the wisdom of the rule that "the Constitution measures the taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

Eminent domain law has been characterized as "a mass of obtuse decisional law that is only occasionally relieved by judicial common sense, pragmatism and candor." Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 Santa Clara L. Rev. 1, 4 (1967). In rejecting the HLRA this Court has a long-overdue opportunity to help return these qualities to the definition of "public use."

III

THE CONTINUED BROADENING OF THE STATE'S POWER OF EMINENT DOMAIN IMPERILS ALL PROPERTY RIGHTS

Any weakening of the "public use" restraint on the power of eminent domain may not be limited to interests in land. In a relatively recent decision, the California Su-

[25] Actually, "[n]o low-cost housing was built in the project area"; instead, "the redevelopers constructed a shopping mall and a complex of high-rent apartments and townhouses." *Urban Renewal*, 8 Pac. L.J. at 674.

preme Court has concluded that "[f]or eminent domain purposes, neither the federal nor the state Constitution distinguishes between property which is real or personal, tangible or intangible." *City of Oakland*, 32 Cal. 3d at 68. While the California Supreme Court's conclusions regarding the Federal Constitution are not binding on this Court, that court cited both *West River Bridge Co. v. Dix*, 47 U.S. (6 Howe) 507, 533 (1848); and *Kimball Laundry Co. v. United States*, 338 U.S. 1, 10-11, 16 (1949), for the proposition that this Court has rejected the claim "that intangible property could not be condemned." *City of Oakland*, 32 Cal. 3d at 66. The Chief Justice pointed out, in her concurring and dissenting opinion, that the condemnation of the Oakland Raiders' franchise contract necessarily includes the "employment contracts between the Raiders and dozens of its employees." 32 Cal. 3d at 77.

Scarce items, tangible or intangible, are, of necessity, generally owned by fewer people. The HLRA mentions that "[l]and, in common with other natural resources, is of finite quantity" and, based on that and supporting speculation regarding the effects of scarcity on inflation and the feeling of well-being which comes with ownership, concludes that condemnation of private land for transfer to a new private owner for the same use constitutes a "public use."[26] If the California Supreme Court is correct regarding the Federal Constitution, then there is no reason to believe that a similar chain of claims would not allow the condemnation of any scarce property, "real or personal, tangible or intangible," 32 Cal. 3d at 68, from McDonald's hamburger franchises to Frank Sinatra concert tickets.

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[26] Hawaii Rev. Stat. § 516-83(a)(9).

IV

THE HAWAII LAND REFORM ACT DISCRIMINATORILY CREATES A SUPERIOR CLASS OF LANDOWNERS

As compellingly outlined in Judge Poole's concurring opinion, the HLRA imposes rent control on residential properties which continue under long-term leases, while simultaneously creating a new class of "lessees-turned-freeholders" who will neither be subject to condemnation nor subject to rent control should they decide to lease their newly-acquired property. *Midkiff*, 702 F.2d at 804. Thus, solely through Hawaii's forceful intervention, the former lessees will have greater property protection than the landowners whose property they have acquired. While landowners are not normally a suspect class for purposes of constitutional analysis, under HLRA they have acquired some of the characteristics of a suspect class. The property rights they are deprived of under HLRA constitute not only important benefits, but fundamental rights. Under the analysis of *Plyler v. Doe*, 457 U.S. 202 (1982), Hawaii's treatment of landowners is, therefore, entitled to heightened scrutiny. *See also J. W. v. City of Tacoma*, ... F.2d ....., 52 U.S.L.W. 2326 (9th Cir., decided November 25, 1983). HLRA is unlikely to survive such scrutiny because the discriminatory treatment it creates furthers no appropriate substantial state goal. There can be no legitimate state interest in taking property from a political minority in order to redistribute it to the political majority. The speciousness of HLRA's rationale is demonstrated by the fact that the law perpetuates the very ills of which it complains.

There is no reason to conclude that long-term leasing by "lessees-turned-freeholders" would not cause the identical harms claimed in HLRA's findings.

CONCLUSION

The Hawaii Land Reform Act has placed in jeopardy the fundamental constitutional right of property. PLF respectfully urges that the decision of the Court of Appeals for the Ninth Circuit finding that Act unconstitutional be affirmed. Any other ruling, including abstention, would effectively remove the "public use" restraint from the Constitution, and condition constitutional safeguards regarding property ownership on unreviewable legislative declarations.

January, 1984

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF QUEEN LILIUOKALANI TRUST, KING LUNALILO TRUST, ALU LIKE, INC. AND ASSOCIATION OF HAWAIIAN CIVIC CLUBS IN SUPPORT OF APPELLEES FRANK E. MIDKIFF ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-141

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-236

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

No. 83-283

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,

v.

FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF QUEEN LILIUOKALANI TRUST, KING LUNALILO TRUST, ALU LIKE, INC. AND ASSOCIATION OF HAWAIIAN CIVIC CLUBS IN SUPPORT OF APPELLEES FRANK E. MIDKIFF ET AL.

INTEREST OF AMICI[1]

The amici are human service organizations in the State of Hawaii who work to meet the unique needs of Hawaiians.[2] They believe the challenged statute, and particularly its application to the lands of appellees, Trustees of Kamehameha Schools/Bishop Estate, affect adversely the interests and welfare of their clients and beneficiaries.

The *Queen Liliuokalani Trust* was established by Queen Liliuokalani[3] in 1909 as a perpetual charitable trust exclusively "for the benefit of orphan and other destitute children . . . in the Hawaiian Islands. The preference to be given to Hawaiian children of pure or part aboriginal blood." The trust maintains six children's service centers on the Islands of Oahu, Molokai and Hawaii to carry out its child welfare activities. Those activities include individual and family services to the children, group services (including an alternative school for alienated youth) and community development services to assist parents and others in self-help action. In 1980 the trust provided service to nearly 5,000 beneficiaries with a budget exceeding 2.6 million dollars.[4]

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[1] Appellants and appellees have consented to the filing of this *amici curiae* brief. The letters of consent have been filed with the Clerk of this Court.

[2] In this brief, the term "Hawaiian" has the same meaning as "Hawaiian native," defined by Congress in the Job Training Partnership Act, Pub. L. 97-300, § 4, 96 Stat. 1325 (1982) as "any individual any of whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii" 29 U.S.C. § 1503(11). The term "Hawaiian community" means all of the Hawaiians, collectively.

[3] Liliuokalani abdicated under pressure in January 1893. Her suit to recover the value of the Crown Lands, which passed to the United States with the annexation of the Islands, was unsuccessful. *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

[4] A small portion of the trust's income is derived from lease rentals of residential lots in a 42-acre tract which could be taken from the trust by the lessees under the provisions of the challenged statute.

The *King Lunalilo Trust* was established in 1874 by the Will of King Lunalilo. Under his Will, as interpreted by the Supreme Court of the Hawaiian monarchy, the King's entire estate was directed to be sold[5] and the proceeds devoted to the operation and maintenance of a home for "poor, destitute and infirm people of Hawaiian (aboriginal) blood or extraction, giving preference to old people." The Lunalilo Home is a custodial care facility accommodating about 50 Hawaiian men and women on an annual budget of about 0.5 million dollars.

Alu Like, Inc. is a private nonprofit corporation whose primary mission is assisting native Hawaiians to develop economic and social self sufficiency. The name means "striving (working) together." The corporation is funded through grants from the U.S. Departments of Health and Human Services and of Labor, State of Hawaii matching funds, and donations by private foundations and individuals. It accomplishes its work through social service centers on the five principal Islands of Hawaii, through an employment and training program and through an economic development institute actively involving Hawaiians in the business and financial communities. Its programs and projects provide direct assistance to nearly 22,000 persons annually with a budget of nearly 5.8 million dollars.[6]

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[5] *In the Matter of the Estate of His Late Majesty Lunalilo*, 4 Haw. 381 (1881). The King had very extensive lands, many of which are now in fully developed residential and business communities and are today worth hundreds of millions of dollars. For a half-century, public funds were required to operate the Home. In the early 1970's, the trust developed 13 acres of the 15-acre Home site. Since then, rent from the 80 new leasehold residential lots has replaced public funds. A condemnation suit against many of those lots, filed by appellant HHA in 1980, has been settled and the trust must convey the lots to lessees desiring to purchase them.

[6] Further information concerning the Queen Liliuokalani Trust, the King Lunalilo Trust and Alu Like, Inc. is in Native Hawaiians Study Commission, *Report on the Culture, Needs and Concerns of*

The *Association of Hawaiian Civic Clubs* is an unincorporated federation of 43 clubs in Hawaii and California. The purpose of the Association is to promote the civic, economic, social, health and moral welfare of individual Hawaiians and the Hawaiian community. The Association has a membership of more than three thousand. Its motto is the same as the motto of the State of Hawaii. In its English translation, this is: "The Life of the Land is Preserved in Righteousness."

STATEMENT OF THE CASE

These amici curiae accept the statement of the case presented by Frank E. Midkiff, et al., appellees. However, these amici also invite the Court's attention to the following additional facts, believed to be relevant to the Court's consideration of the constitutional issues raised on this appeal.

I. THE KAMEHAMEHA SCHOOLS/BISHOP ESTATE OCCUPIES A UNIQUE POSITION IN HAWAII AND, PARTICULARLY, IN THE HAWAIIAN COMMUNITY.

A. The nature and purpose of the Trust, its assets and the caliber of its Trustees have combined to establish the Trust as one of the principal leaders in and protectors of the Hawaiian community.

1984 is the centennial of the probate of the Will of Bernice Pauahi Bishop, which established the Trust that now provides direct service to more than 35,000 Hawaiians annually. The Will directed her five Trustees, and their successors, to establish and maintain schools for boys and girls and to provide care for orphaned children,

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Native Hawaiians, Vol. 1, pp. 445-447 (1983). The Report was mandated by the Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 et seq. (1980) (codified at 42 U.S.C. § 2991a). For convenience, this Report is hereafter referred to as "Study Commission."

giving preference to those of aboriginal blood. The first of the Schools was established in 1887 and the other in 1894. Until the economy of Hawaii expanded, following statehood in 1959, the Trust's income was so limited that its educational work for and in the Hawaiian community was carried on only at the Schools. However, as previously unproductive lands of the Trust were developed in urban usage and the Trust's income substantially increased, the Trustees expanded the Trust's educational role into the community and into the public schools where the majority of Hawaiian students are educated. Particularly in the past dozen years, the Trust has achieved a high degree of visibility in the State through these activities. It is generally known that the Trust is the largest private landowner in Hawaii and that its assets are dedicated to the educational mission of the Trust. It is not as generally known that more than 97% of the Trust lands has been classified by the State Land Use Commission as conservation or agriculture lands, that those lands produce little revenue and that the Trust's sizeable annual income is mostly generated from that small portion of its lands (less than 3%) classified as urban. These latter include the residential subdivisions at which the statute here in issue is aimed, as well as resort and other commercial properties. In all events, the annual budget of the Trust far exceeds that of any other entity (except government) working with the Hawaiian Community. This fact, and recognition that the Trust is a perpetual trust, identify the Trust as the strongest advocate of the interests of the Hawaiian community.

The manner of selection of the Trustees of the Trust, and the responsibilities entrusted to them, assure that they will be persons of high caliber. The five initial Trustees appointed by Mrs. Bishop were four prominent, successful, professional and business men and a widely known and respected clergyman. By direction in her Will, successors to these five have been appointed by a

majority of the Justices of the Hawaii Supreme Court, who have exercised their discretion with care, selecting persons who were established leaders in the community. It would be natural to expect that a well endowed trust whose mission is to serve the Hawaiian community, that is governed by persons who are themselves community leaders, would be looked upon as the leader for the Hawaiian community and that, indeed, is the fact.

B. The work of the Trust is of great value to the Hawaiian community, and to the State as a whole. It deserves and is entitled to be preserved and encouraged.

The Trustees have adopted a broad mission statement committing the Trust to offer maximum meaningful educational opportunities to develop the full potential of Hawaiian youth. The major goal of the long-range plan formulated to carry out that mission is to bring Hawaiian students out of their substandard levels and up to par with students nationwide in levels of educational achievement. The plan relates not merely to the 2,850 full-time students annually enrolled in the primary and secondary school programs at the Kamehameha Schools' campus, but also to the more than 33,000 Hawaiian students in public schools. Strengthening of the public school system is essential to accomplishment of the mission of the Trust, so nearly half of the Trust's annual education budget already is devoted to programs for public schools. These include, for example, an early education reading and comprehension program conducted in the public primary schools in cooperation with the State Department of Education. That program was researched, developed, tested and perfected by the Kamehameha Education Research Institute, created and funded by the Trust, which employs educators, psychologists and other professionals in research and development of education methods and programs best suited to bring Hawaiian students up to national norms.

In addition to classroom programs for full-time students, the Trust, through its Extension Education Division, annually serves thousands of others in the Hawaiian community, ranging in age from preschoolers to senior citizens. These programs cover a wide spectrum. They include evening adult education classes; lectures on Hawaiian culture, crafts, history and other subjects; courses for expectant mothers and for those with very young children; and summer "live-in" programs on campus with teaching designed to enrich the standard curriculum. These additional programs even include direct financial aid to students (not limited to graduates of the Kamehameha Schools) for post high school, college, vocational and other education.

The Trustees annually account to the Circuit Court of the First Circuit of the State of Hawaii. The accounts are reviewed by both a court-appointed Master and the State's Attorney General, each of whom reports in writing his recommendations to the Court concerning the accounts. It has never been suggested that the Trustees' development and leasing of residential lots, their sale of some of them and their insistence on retention of the majority of them was wrong or not in the best financial interests of the Trust. The Trustees' management of the real estate of the Trust is consistent with the mission of the Trust and is appropriate to the preservation of culture and values in the Hawaiian community, as more fully appears hereinbelow. The Trust is the leader in that community and, perhaps, by reason of that leadership has also become a target. The greed of persons who seek to dismember its land ownership to satisfy their personal desires should not be allowed to prevail over considerations demanding that land be retained and continue to be devoted to the education and support purposes of the Trust.

II. BETTERMENT OF THE STATUS OF INDIVIDUAL HAWAIIANS, AND IMPROVEMENT OF THE HAWAIIAN COMMUNITY IN GENERAL, DEPENDS UPON PRESERVATION OF HAWAIIAN CULTURE, WHICH IS INTIMATELY TIED TO THE LAND.

A. Land has special value to Hawaiians. Detachment from it has resulted in disproportionately poor social statistics in the Hawaiian community.

To Westerners, the importance of land lies primarily in its economic value and in the access it provides to political and economic power. To Hawaiians, land is important for entirely different reasons, derived from traditional Hawaiian culture. Land provided the physical connection between them and their gods, formed the basis for their relationships with their rulers and governed their kinship with their environment.

> Hawaiians, through traditions which have not yet totally disappeared, extend their ties with the natural environment to the supernatural in their own special manner. The sea, the beach, the mountains —the total environment—are linked importantly to the lives of the people.[7]

Land was looked upon not as belonging to any individual, but to the gods. All who lived upon and used it, including the rulers, merely administered the land for the benefit of the gods and the community as a whole.

> It is important to emphasize that the concept of fee-simple ownership of the land was unknown to Hawaiians. The high chiefs did not own the land—they merely managed the land and other resources: "From a religious viewpoint, the ali'i nui [high

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[7] Native Hawaiian Educational Assessment Project, *Report to the U.S. Secretary of Education*, p. 99 (1983). This Report (hereinafter, for convenience, cited as "Educational Assessment") was mandated by the Act of October 3, 1980, Pub. L. No. 96-374, 94 Stat. 1499, in which "the Congress declare(d) its commitment to assist in providing the educational services and opportunities which Native Hawaiians need" 20 U.S.C. § 1221-1, note.

> chief] was a person of divine power. Yet his authority was not a personal authority. It was, instead, a power channeled through him by the gods. In relation to the land and natural resources, he was analogous to a trustee." [8]

These special relationships to their environment and to land are also demonstrated by the fact that all of the high chiefs traced their genealogy back to the same beginning pair: Wakea, which is the cosmos, in the sense of the observable heavens and anything lying beyond, and Papa, the terra firma, or solid land.

In the mid-nineteenth century, fewer than 50 years after western merchantmen and whalers (and later, missionaries) began regularly to arrive and remain to do business in Hawaii, King Kamehameha III, his 251 chiefs who were stewards of the land for the lesser chiefs and people, his Privy Council and the Legislature of the Hawaiian Kingdom converted the ancient land tenure system into an Anglo-Saxon, fee-simple regime which did away with the reciprocal rights, privileges, duties and responsibilities among King, chiefs, lesser chiefs and commoners. In the physical division of the real estate, the "undivided interests" of all in the whole of the land were converted by vesting the entire "bundle of rights" recognized by the common law in the new "owners" of particular tracts. This entire process took a scant nine years, from mid-1846 through early 1855.[9] At its conclusion, the government owned 1.5 million acres, the King owned 1 million acres and the remaining 1.5 million acres were owned by the chiefs, all subject to the rights of the people.[10]

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[8] Study Commission, p. 253.

[9] For a description of the process, see R. Kuykendall, *The Hawaiian Kingdom*, Volume I, pp. 269-298 (1938).

[10] That is, reserving the house lots, taro patches and gardens of natives lying within the boundaries of the lands awarded to the government, King and chiefs. *Territory of Haw. v. Liliuokalani*, 14 Haw. 88 (1902).

Through their lack of understanding of the new land system, and their cultural propensities to share and to be more concerned with pleasures of the present than with the fears of the future, the Hawaiians soon became materially, as well as spiritually, separated from their land. The 1890 Census disclosed:

> Of a population of near 90,000, fewer than 5,000 owned land. The relatively small number of Americans and Europeans owned over one million acres. Although three out of four landowners were native Hawaiian, three out of four acres belonging to private owners were held by westerners.[11]

It would be both oversimplification and overstatement to assert that loss of their land, with which Hawiians so closely identified, was the sole cause of the decline of the socio-economic status of Hawaiians in their own homeland.[12] On the other hand, there can be no more doubt that the loss of their land was a strong contributing cause than there can be that Hawiians are, indeed, disproportionately represented in many negative social statistics. Compared with other ethnic groups, Hawaiians have greater percentages unemployed, in lower income groups, on public welfare, arrested for crimes,[13] prosecuted, incarcerated and on probation, bearing illegitimate children, abusing drugs and alcohol and dying short of normal life expectancy.[14] It also has been documented that Hawaiians have lower educational achievement, are over-represented among those qualifying for special education (learning disabled, mentally retarded educable,

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[11] Study Commission, p. 257.

[12] Cf. generally, Lopez-Reyes, *The Demise of the Hawaiian Kingdom*, 18 Haw. B.J. 3 (1983).

[13] "The picture for native Hawaiian juveniles arrested is even more striking. Native Hawaiian juveniles comprised the largest per cent of those arrested for each crime examined." Study Commission, p. 12.

[14] Study Commission, p. 12 and Educational Assessment, p. 24.

handicapped, and so forth) and are disproportionately absent from school.[15]

B. The combination of special educational needs of the beneficiaries of this Trust and the cultural values of those beneficiaries require that the statute's assault on the landholdings of the Trust be repulsed.

The Educational Assessment[16] determined that so much of the Hawaiian culture as still exists has distinctive features which are important to the success or failure of students who are taught in the predominantly non-Hawaiian "culture of classrooms." It documented the fact that Hawaiian students have educational needs which are indeed related to their unique cultural situation. They have a different learning style that emphasizes a preference for actual experience, with peer orientation and affiliation; they tend to have a low self-image and are expected to achieve under a curriculum which is not culturally relevant to them.[17] On the other hand, the Educational Assessment also determined that renewed community interest in things Hawaiian seems to be developing a new sense of pride among Hawaiian students.[18]

Mrs. Bishop executed her Will and Codicils in 1883 and 1884. By that time, the new land tenure system had been in place for more than 30 years and the alienation of the Hawaiians from the land was well under way. Also well under way were the decimation of the Hawaiian population,[19] and the degeneration of the social and economic status of the Hawiians. That Mrs. Bishop ob-

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[15] Educational Assessment, p. vii.

[16] See note 7, *supra*.

[17] Educational Assessment, pp. vii and viii.

[18] Educational Assessment, p. viii.

[19] See Study Commission, pp. 38-40.

served the deterioration of her people, and was determined to reverse that process, is attested by the fact that, with the exception of minor bequests and devises, she left her entire estate in a perpetual trust for the education of children and care of orphans. Nearly four decades before enactment by the United States Congress of the Hawaiian Homes Commisison Act, which had as its purpose the rehabilitation of Native Hawaiians by returning them to the land under 99 year leases at rentals of $1.00 a year,[20] Mrs. Bishop recognized that her people were threatened with ultimate extinction and provided for the institution which now serves as their primary private protector. The lands of the Trust are an aggregation of inherited lands that formerly were owned by her chiefly parents, and her royal cousins, King Kamehameha V and Princess Ruth Keelikolani. Both by reason of the size of her estate and the fact that it is composed of lands formerly held by the ali'i (chiefs and royalty) and, of course, because of the purposes of the Trust, this is the last aggregation of land with which the Hawaiian community can identify and from which it can draw cultural sustenance. It stands, not in replacement, but at least as a symbol of the totality of the land to which they related in their early culture. Not only is the targeted[21] land required to be preserved for the cultural benefit of the Hawaiian community, it is also essential to continuation of the educational programs of the Trust. Only about 15% of the costs of those programs is recovered through tuition and fees.

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[20] Hawaiian Homes Commission Act, c. 42, 42 Stat. 108 (1920); *id.* § 208(2).

[21] None of the other owners of close to or more than 100,000 acres in Hawaii is engaged in significant, if any, single-family residential leasing. Also, of all other owners of 5,000 acres or more, only 7 have or did have any significant numbers of single-family residential leaseholds. These large owners are listed in Department of Geography, University of Hawaii, *Atlas of Hawaii*, p. 153 153 (2d ed. 1983).

The remainder is funded by the Trust, principally by land rent revenues from fewer than 9,000 acres of its lands in the urban classification.

SUMMARY OF ARGUMENT

This statute will operate only for the benefit of those lessees who choose to take advantage of its provisions. For the most part, they are relatively affluent people and, indeed, must be affluent in order to qualify to purchase the land the statute authorizes to be transferred to them. Upon and after transfer, the land will be used entirely for their personal purposes, whether as residences or for investment, sale or rental. In contrast, that land is now used by the Trust as the source of funding for educational and support programs which benefit the entire community. The statute effects takings for purely private use and in the process destroys the public benefit accruing from the current employment of these lands.

The statute is aimed solely at already improved residential land, irrespective of the sizes of the holdings of the owners of that land, and can affect but a small fraction of the privately held land in the State of Hawaii. Despite the declarations of the legislature, the statute will not and cannot have the intended effect upon the two principal problems the legislature claimed to be addressing, those of concentration of ownership and high price of residential housing.

If the legislature truly wished to solve the alleged problems of concentration of ownership and high cost, utilization of already existing statutes could bring about the desired results. Use by the legislature of procedures equivalent to the antitrust remedy of divestiture in a manner never countenanced by any court, and deprivation of the landowners' full measure of compensation for the land taken, both demonstrate that the real purpose of the statute was to enable title transfers to those lessees who wish to buy, without regard to the harm wreaked upon the landowners forced to sell.

ARGUMENT

I. WHILE THE CONSTITUTION REQUIRES LEGISLATION, AND PARTICULARLY LEGISLATION AUTHORIZING CONDEMNATION, TO BE PREDOMINANTLY FOR PUBLIC BENEFIT AND ONLY INCIDENTALLY FOR PRIVATE BENEFIT, THIS STATUTE IS VICE VERSA.

A. The current use of the land benefits a wide segment of the public.

As already noted, the educational and support activities of the Trust are funded almost entirely by the Trust, principally from land rents.[22] As also noted, the major goal of the Trust is to bring Hawaiian students up to par with national norms. The activity of the Trust devoted to attainment of that goal has important beneficial impact on the Hawaii public school system and significant implications for education systems nationally.

The deplorable condition of the educational systems of the nation as a whole, the widespread functional illiteracy that has resulted from a progressive deterioration of those systems, and the alarming implications of these facts have been detailed in several recent nation-wide studies. See, *e.g.*, Report of the National Commission on Excellence in Education, A Nation At Risk: The Imperative For Educational Reform (1983). In striving

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[22] Most of the people directly served by the educational activities of the Trust are in the Hawaiian community. The special needs of that community have been recognized by the United States Congress and Executive Departments for many years. The earliest recognition was the Hawaiian Homes Commission Act. Note 20, *supra*. The most recent have been the reports of the Study Commission, the Educational Assessment and Federal-State Task Force on the Hawaiian Homes Commission Act, Report to U.S. Secretary of the Interior and Governor of Hawaii (1983). Congress has often made specific provisions for "Native Hawaiians," "Native American Pacific Islanders" and "Hawaiian Natives," intending to meet their particular needs. See 29 U.S.C. § 1503; 42 U.S.C. § 1996; 42 U.S.C. § 2991a; and 42 U.S.C. § 4577(c)(4).

to attain its own goal, the Trust is improving education in Hawaii through programs on the campus of the Kamehameha Schools, through programs in the public schools,[23] through Extension Education Division programs and through research. That the Trust is an exemplary institution in the effort to rescue the nation's endangered educational system has recently been recognized by Senator Stafford, the Chairman of the United States Senate Education Subcommittee, who stated he:

> . . . would be most pleased if during this decade we were able to use Kamehameha Schools as a prime example of what our nation's private elementary and secondary schools have the potential for becoming; that is, a true living laboratory combining practical expertise with ongoing quality research endeavors.[24]

B. In contrast to the benefit to the public now accruing from the leasehold system, use of the residential lots by the persons who cause them to be condemned will be for purely private purposes.

The land authorized to be taken by the statute is parcels two acres or less in size "which is used or occupied or is developed, devoted, intended, or permitted to be used or occupied as the principal place of residence for a single family."[25] Condemnation proceedings can be commenced when a specified number of lessees,[26] each of whom is required to be the "owner of a residential structure" on the

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[23] Some insight into the background of the Trust's involvement with the public schools in Hawaii, their current relationship and the past and hoped for future participation of the Congress and federal agencies in that relationship, can be gained from Cook, *Research, Program Development, and the Education of Native Hawaiians*, Am. Psych., p. 1015 (1983).

[24] 129 Cong. Rec. S17205 (daily ed. December 14, 1983).

[25] H.R.S. § 516-1(11).

[26] H.R.S. § 516-22.

leased lot,[27] have applied to purchase[28] the lots. These provisions make it apparent that the statute contemplates purely private single-family residential use by the person who applies and pays the money to fund the condemnation. The aim of the statute, obviously, is to transfer the title to the land from the lessor to the lessee. Despite the rhetoric of the legislature, the use of the land will be purely private with the benefits of ownership accruing solely to the new owner for whom the State acted in acquiring the title.

It should also be noted that the statute nakedly invites speculators to take advantage of the acquisition process. The statute contains no requirement that the owner of the dwelling, who purchases the land, must himself reside in the house either before or after the purchase. He must merely be a resident of the State or have a bona fide intent to reside in the tract and, if the latter, not even upon the subject lot.[29] Nor does the statute contain any restriction upon the period of time which the new owner must retain title to the land or the house, any limitation upon the amount of rent he can charge to tenants (unless he chooses to lease it for a period exceeding 20 years[30]) or any restriction on the amount of other real estate the purchasing lessee may own, including single-family leasehold residential property, so long as that other real estate does not include any "fee simple lands suitable for residential purposes within the County."[31] A parent with grown children, or any other group of investors, can purchase as many lots as they have investors in the group, irrespective of other real estate they may own (with the single exception noted), and thereafter sell or rent the

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[27] H.R.S. § 516-33(3).

[28] H.R.S. § 516-22.

[29] H.R.S. § 516-33(2).

[30] H.R.S. § 516-1(5).

[31] H.R.S. § 516-33(7).

property for whatever the market will bear, irrespective of the effect the amounts charged will have on land values. Certainly the investors will derive profit from this course of conduct, but how is the public interest served at all; except adversely?

The ultimate result of alienation of the Trust's land that the statute fosters may be found in sad examples of extensive sales of native lands in Hawaii and Oklahoma. Following sales of its lands, the King Lunalilo Trust was forced to rely on the public dole to support its Home residents.[32] In Oklahoma, most of the Osage Indians sold land granted to them so that few now enjoy the wealth derived from the underlying oil field.[33]

Compare the situation of the Agua Caliente Indians of Southern California, who long ago wisely decided to enter into long-term leases with hotels and others, rather than sell, their tribal lands, fortuitously located in Palm Springs, California. Today, as a result, the Tribe enjoys prosperity unmatched by any other Native American Indian Tribe.[34]

C. Only the rich, not the poor, will be served by this statute.

The majority of the Trust's lots impacted by this statute are in eastern suburban Honolulu.[35] The arithmetical average of the median household income in the census tracts in that geographical area, as revealed by the 1980 Census, exceeds $42,000.[36] None of those census tracts

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[32] See note 5, *supra*.

[33] Pekkanen, *The Land, Who Owns America?*, Town and Country, May, 1983, p. 181.

[34] *Id.*

[35] In census tracts 1.02, 1.03, 1.04, 1.05, 4.01, 4.02, 5, 6 and 9.01.

[36] U.S. Department of Commerce, Bureau of the Census, *Census of Population and Housing*, 1980 Table P-11, PHC 80-2-183.

had more than 3.4% of families within the tract classified below poverty level and none had more than 6.6% of persons classified within 100% to 124% of poverty level. By contrast, the high percentages of families below poverty level, and of persons at 100% to 124% of poverty level, are in other census tracts and go as high as 75% for families below poverty level and as high as 68.6% for persons at 100% to 124% poverty level, with figures close to 50% for both categories in many of them.[37]

No census figures are available showing the values of single-family residences in the leasehold tracts because census information on value is by housing unit, without identification of the housing unit as single-family or multi-family. However, the high value of these residences is demonstrated by the fact that the mathematical average of the median values of the housing units in the census tracts of the Trust in eastern suburban Honolulu (excluding all values in excess of $200,000) exceeds $180,000, while the median value of all reported housing units in the City and County of Honolulu (with the same exclusion) is slightly less than $119,000.[38]

It is indeed ironic, too, that the Trust should now be penalized through the forced sale of its residential lands for activity that it undertook, among other reasons, to alleviate a dire need for housing. The State Housing Acts of 1947 and 1949[39] both declared the existence of "an acute shortage of housing"[40] making imperative immediate action to meet the emergency. These Acts provided for the construction of State housing projects, among other reasons, because "private enterprise has failed to

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[37] *Id.*

[38] *Id.*, Table H-1, PHC 80-2-183.

[39] H.R.S. Chapter 359, Parts I and II.

[40] H.R.S. §§ 359-1 and 359-31.

construct the large number of housing units necessary to remedy" the problem.[41]

II. THE STATUTE IS IRRATIONAL, INDISCRIMINATE IN ITS IMPACT, AND NEITHER DESIGNED TO NOR CAPABLE OF EFFECTING THE RESULTS DESIRED BY THE LEGISLATURE.

A. The statute cannot and will not affect the "concentration of land ownership in the State in the hands of a few".[42]

At the outset, it must be noted that the State government owns 36.5% of the land in Hawaii and 10.1% is owned by the federal government.[43] Of all of the private landowners owning 5,000 acres or more[44] (that is, 12/100ths of 1% of the land area of Hawaii) only 7 have been or are the owners of development tracts containing the single family residential leaseholds lots at which the statute is aimed. Those development tracts have constituted only a fraction of their landholdings and even the elimination of their ownership in 100% of the lots would not materially affect the size of their landholdings. For example, amicus curiae Queen Liliuokalani Trust, due to the relatively sparse populations of the areas where it owns land suitable for single family lots, has been able to develop only 42 acres as a development tract. That acreage represents only 4/10th of 1% of the aggregate of its landholdings, of which more than 95% are in the agriculture and conservation classifications. For further example, Mrs. Bishop's Trust at one time had slightly more than 3,400 acres devoted to development tracts and that acreage represented only 1% of its total holdings. Residential leaseholds comprise so small a portion of the

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[41] H.R.S. § 359-31.

[42] H.R.S. § 516-83(a)(1).

[43] *Atlas of Hawaii*, p. 152.

[44] *Id.*, p. 153.

totality of privately held land that even complete divestiture of all residential leasehold land would have a negligible effect on the alleged concentration of ownership.

Furthermore, the statute is not limited in its operation to the holdings of large landowners. It operates against all owners of all lots in development tracts. These include small landowners such as amicus curiae King Lunalilo Trust whose aggregate landholdings are 15 acres. It also includes persons who could be the owner of only a single leased lot. Although the statute refers to development tracts, it does not exclude development tracts in which there are multiple owners, some of whom may be the owners and lessors of only a few lots or even a single lot. Examples of such development tracts are Manoa Acres, Kahanahou Circle and Parrish Trust tracts. One lessor in Manoa Acres, against whom the challenged statute would apply, owns only one lot in the tract.

Finally, there is absolutely no government control over application of the statute to the various lands to which it might by its terms be applied, or any means of predicting the location, number and sizes of lots whose ownership might be transferred pursuant to its provisions. An opportunity to purchase is afforded to all lessees in development tracts, but whom among them may wish to purchase, be able to afford to purchase and qualify to purchase cannot be foretold. The targets of the statute are the lessors of those lots, whether their holdings are small or large. The sole purpose to be achieved is the forced transfer of ownership to lessees who wish to buy.

B. The statute cannot and will not favorably affect residential land prices.

Even to those untutored in economics, the effects of supply and demand on prices are well known. This statute, however, pretends that the law of supply and demand does not exist or does not operate in the residential housing market. The statute does not create a single addi-

tional housing unit or even one additional lot on which a housing unit could be built. The number of housing units in the market is absolutely unaffected by the statute. While the number of fee simple owners may be increased by the statute, the numbers of houses and lots will not be.

In any event, the statute concerns itself with only a portion of the residential housing market and makes the unwarranted assumption that increasing the number of owners in that portion of the market will reduce the prices in that portion of the market. This is absurd. The market for residential housing consists of leasehold single-family residences (which this statute addresses); fee simple single-family residences; both fee simple and leasehold townhouses, condominiums and other multi-family housing units; and rental units (none of which this statute addresses). It is the demand in that entire market and the supply in that entire market that determine prices of units in the market. In that market, there were, on the Island of Oahu, in 1982, nearly 257,000 housing units, of which approximately 35,500 were owner-occupied units on leased land.[45] The latter figure includes both units in multi-family buildings (e.g., condominium apartments), to which the statute does not apply, and single-family buildings, to which the statute does apply.[46] The statute, therefore, reaches only a portion of the reported number of owner-occupied residential units on leased land. Even if it be assumed that as many as half of that number are single-family units, they would constitute less than 7% of the housing units in the market. To conclude, as the legislature apparently did, that the transfer of title to an undetermined, and indeterminate, number constituting less than 7% of residential housing

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[45] *State of Hawaii Data Book*, Table 486, at p. 497 (1982).

[46] No figures are published showing the numbers of single-family residential leasehold units and single-family residential fee simple units, much less any showing the numbers of these that are owner-occupied and that are rented.

units, from the current owners to the persons occupying the units, would materially decrease residential land prices or residential housing costs defies reason, and the lessons of common experience. In short, the statute affects neither the supply side nor the demand side of the economic equation and therefore cannot effect the results desired and proclaimed by the legislature.

III. THERE ARE RATIONAL, LESS DRASTIC WAYS TO SOLVE PRICE AND CONCENTRATION PROBLEMS, WHERE THE RESULTS CAN BE PREDICTED AND CONTROLLED.

A. Forced sales to lessees who wish to purchase deprive the Trust of the full value of the land.

Although "just compensation" is to be paid to the trust in the eminent domain proceedings, that compensation will not assure that the Trust receives the full value of its land. The law of compensation in eminent domain is general in its application and is not tailored to particular situations, much less to the application of this unique statute to the land of the Trust. Examples of the adverse impact of that general law, on the land of this Trust, abound.

It is well-settled that value to the owner is not an element to be considered in arriving at just compensation.[47] Therefore, the cultural value of this land and the contribution of that value to the educational mission of the Trust, and to the promotion of the betterment of the Hawaiian community in general, must be ignored in the eminent domain proceedings. It is equally well-settled

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[47] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (values deriving from unique need for or idiosyncratic attachment to property are not compensable); *United States v. Cors*, 337 U.S. 325, 332 (1949) (special value to an owner because of property's adaptability to his needs is not compensable); *United States v. Miller*, 317 U.S. 369, 374-375 (1943) (same); *United States v. Estate of Bernice Pauahi Bishop*, 1 U.S. Dist. Ct. Haw. 179, 189 (1901) (willingness or unwillingness of defendant to part with property is not a proper element of value in condemnation case).

that just compensation does not include the award of fees, expenses and costs in recovering that compensation.[48] Furthermore, the compensation to be paid is the fair market value at the date of taking,[49] so nothing is paid for the value increment arising from reasonably expected long-term appreciation in the land value. Nor, when entire individual lots are taken, can there be any recovery of the loss in value of other lots in the tract, or damages for increase in costs of administrative with respect to those lots, because this is not the kind of severance recognized by the law of condemnation as compensable.[50]

In short, the seller is deprived of all of the advantages of a negotiated sale that permit him to obtain the highest price, or advantage, from the sale of the property. These include the opportunity to replace the land taken with other land to be exchanged for it, and the value obtainable through adjustments in the time of sale, the number of parcels in the sale, the locations of those parcels, the terms of payment and so forth. Here, instead, the seller is required to sell the lot identified, at the time specified, for cash, and without regard to the effect of that sale upon the seller's other property.

B. The statute provides a process akin to the remedy of divestiture, but ignores judicially recognized limitations on the use of that remedy.

As a matter of substantive law, a general legislative pronouncement of concentrated ownership is insufficient

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[48] E.g., *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979); *Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *State v. Pioneer Mill Co.*, 64 Haw. 168, 186-187, 637 P.2d 1131, 1143 (1981); *State v. Davis*, 53 Haw. 582, 586-587, 499 P.2d 663, 667 (1972).

[49] *Almota Farmers E. & W. Co. v. United States*, 409 U.S. 470, 474 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *HHA v. Rodrigues*, 43 Haw. 195, 197 (1959).

[50] *Sharp v. United States*, 191 U.S. 341, 353-355 (1903); *United States v. Miller*, 317 U.S. at 376.

to create an anti-trust violation, much less warrant the drastic remedy of divestiture. In a civil anti-trust action, the government is required to carry its burden by a preponderance of evidence and a court may not rely upon *ex parte* administrative findings to order divestiture as it "violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination." *United States v. International Harvester Co.*, 274 U.S. 693, 703 (1927).

Even assuming the alleged concentration can be proved and requires governmental corrective measures, certainly this statute is not a permissible means to that end. The statute provokes indiscriminate divestiture of all residential leasehold lands owned by large and small landowners. No anti-trust decision has required such a drastic remedy. Even in a case involving enormous market control (e.g., in excess of 87%), the drastic remedy of divestiture was used sparingly. *United States v. Grinnel Corp.*, 384 U.S. 563, 578 (1966). Further, this Court warned in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951), that courts must exercise restraint, as divestiture is not to be used "indiscriminately, without regard to the type of violation or whether other effective methods, less harsh are available."

C. Means of increasing the supply of residential land and reducing the cost of that land to purchasers are readily at hand.

The Constitution of Hawaii calls for the use of public lands "for the development of farm and home ownership on as widespread a basis as possible."[51] Statutory authorization, spelling out the means for carrying that mandate into effect, exists in abundance. These laws provide for the subdivision and sale of public lands in fee

[51] Haw. Const. art. XI, § 10.

simple or by long-term leases and for the acquisition of private lands by the State for similar action and disposition.[52]

The State of Hawaii controls the first level of land use regulation [53] and also has the authority to preempt county zoning and land use ordinances.[54] These land use powers can be exercised in such manner as to create the required use classifications to allow residential development and to negate any conflicting ordinances or rules of lesser governmental agencies. Such actions would not only permit and encourage development, but could also substantially reduce the costs of such development, and the ultimate cost to purchasers of the land, by exempting developments from compliance with costly improvement requirements. Further, exemption or relief from property, excise and other taxes could be granted to any one or more of sellers, developers and purchasers. Also, if useful, long-term, low interest loans could be used to encourage development and purchases. No doubt nimble minds could conceive of many additional ways in which government could remove current limitations on supply of residential land and encourage development for residential use of land currently unused or in other uses.

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[52] H.R.S. § 171-45, §§ 171-70 through 171-84 and H.R.S. Chapter 206.

[53] H.R.S. Chapters 205 and 205A.

[54] See, for example, H.R.S. § 359G-4.1.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 83-141-AFX
Status: GRANTED

Title: Hawaii Housing Authority, et al., Appellants
v.
Frank E. Midkiff, et al.

Docketed:
July 28, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
83-236
83-283

Counsel for appellant: Tribe, Laurence H.

Counsel for appellee: Prettyman Jr., E. Barrett

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1983	G	Statement as to jurisdiction filed.
2	Jul 28 1983		Appendix of appellant HI Housing Auth., et al. filed.
3	Aug 15 1983		Application for stay filed with WHR (A-113).
4	Aug 15 1983		Response requested -- due by August 19, 1983. Appellants have leave to file reply by August 23, 1983.
5	Aug 23 1983		Waiver of right of appellees Kahala Comm. Assn., Inc, et al. to respond filed.
7	Aug 26 1983		Order extending time to file response to jurisdictional statement until October 3, 1983.
9	Aug 19 1983		Response of appellees to application for stay filed.
10	Aug 22 1983		Response of Portlock Community Assocation (Maunalua Beach) to application for stay filed.
11	Aug 23 1983		Response of Kahala Community to application for stay filed.
12	Aug 23 1983		Reply to appellees' opposition to motion to vacate/stay filed.
13	Sep 2 1983		Order denying application for stay by Rehnquist, J., with memorandum opinion.
14	Oct 3 1983		Brief of appellees Frank E. Midkiff, et al. in opposition filed. VIDED.
15	Oct 5 1983		DISTRIBUTED. October 28, 1983
17	Oct 17 1983		Application for stay filed and order denying same by Rehnquist, J. on October 17, 1983 (A-278).
18	Oct 31 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 83-236 and 83-283 and a total of one hour is allotted for oral argument. Justice Marshall OUT.
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19	Dec 15 1983		Brief amicus curiae of Hou Hawaiians, et al. filed.
20	Dec 15 1983		Brief of appellants HI Housing Auth., et al. filed. VIDED.
21	Dec 15 1983		Joint appendix filed. VIDED.
22	Dec 22 1983		Application for leave to file appellees' join brief on the merits in excess of page limitations, and orcer
23	Dec 22 1983		granting same by Rehnqusit, J., not to exceed 100 pages.
24	Jan 16 1984		Record filed.
25	Jan 16 1984		Certified original record & C.A. proceedings receivec. (Box).
26	Jan 23 1984		Brief of appellees Frank E. Midkiff, et al. filed. VIDED.
27	Jan 23 1984		Brief amicus curiae of Queen Liliuokalani Trust, et al. filed. VIDED.
28	Jan 23 1984		Brief amicus curiae of Office of Hawaiian Affairs filed. VIDED.
29	Jan 23 1984		Brief amicus curiae of Pacific Legal Foundation filec.

No. 83-141-AFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
30	Jan 28 1984		Supplementary Joint Appendix filed. (Vide).
31	Feb 14 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (4th case) This case is consolicated with Nos. 83-236 & 283. (1 hr.)
32	Feb 27 1984		CIRCULATED.
33	Mar 7 1984	D	Motion of appellants in No. 83-236 for divided argument filed.
34	Mar 19 1984		Motion of appellants in No. 83-236 for divided argument DENIED. Justice Marshall OUT.
35	Mar 20 1984	X	Reply brief of appellants HI Housing Auth., et al. filed.
36	Mar 26 1984		ARGUED.